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In the Supreme Court of the United States

OCTOBER TERM, 1924

NOS. 25 AND 26

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and Pennsylvania Power & Light Company, appellants

v.

THE VILLAGE OF HUBBARD, OHIO, APPELLEE

THE UNITED STATES OF AMERICA, THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION, appellants

v.

THE CITY OF WELLSVILLE, OHIO, APPELLEE

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Are the two companies named within the Interstate Commerce Act and subject to regulation by the Commission? and if so, May the franchise ordinances

granted by the municipalities to the companies prevail against the orders of the Interstate Commerce Commission? are the questions (64 I. C. C., 493; 64 I. C. C. 517).

I

In the original bills in equity neither of the appellees raised the question that either company was not subject to the Interstate Commerce Act. In each case the foundation of the bill was that the order of the Commission may not overthrow the franchise ordinances.

On the question of the validity of the franchise ordinances the learned District Court said (No. 25, Tr. 34; No. 26, Tr. 39; 278 Fed. Rep. 754, 761), "* * * we pass without deciding the questions raised and argued on this contention of plaintiff, for the reason that we are content to dispose of the case upon a consideration of plaintiff's other contention."

The learned District Court then proceeded to annul the orders on the ground that the two appellant companies were without the Interstate Commerce Act.

In the amendment on the face of the bill (Tr. 6) in the *Hubbard Case*, No. 25, the allegation was inserted that the company (a) is not a common carrier, (b) is not an interurban electric railway operated as a part of a general steam railway system of transportation (c) nor is it engaged in the general transportation of freight. There is an earlier allegation (Tr. 2) that the company "owns and operates an

electric street railway." There is no allegation that the company is not engaged in the general business of carrying passengers in interstate commerce.

In the *Wellsville Case,* No. 26, it is specifically alleged that the company "is a common carrier of passengers for hire." (Tr. 1.)

The findings of the Commission disclose that these two companies hold themselves out to carry both freight and passengers and that they do actually carry both.

The decisions conclusively adjudicate that if carriers hold themselves out to and actually do carry freight and passengers, or either, they are within the terms of the statute regardless of the extent to which they carry or of the volume of the business.

The mandate is "That the provisions of this act shall apply to common carriers engaged in—

"The transportation of passengers *or* property wholly by railroad," etc.

"The transportation of oil *or* other commodity by pipe line," etc.

"The transmission of intelligence by wire *or* wireless," etc.

The mandate further is, "The provisions of this act shall also apply to such transportation of passengers *and* property *and* transmission of intelligence * * * but shall not apply—

"To the transportation of passengers *or* property, or to the receiving, delivery, storage, or handling of property wholly within one State," etc.

"To the transmission of intelligence by wire *or* wireless wholly within one State," etc.

"To the transportation of passengers *or* property by a carrier by water," etc.

The all-embracing provisions are that the act shall apply to *common carriers* engaged in "the *transportation* of passengers *or* property," and the provisions of the act shall also apply to "*such* transportation of passengers *and* property."

The failure to allege that the companies are not engaged in the carriage of passengers in interstate commerce renders the bills fatally defective in the face of the findings of the Commission. The two carriers are clearly engaged in the carriage of both passengers and freight, and it is sufficient if they carry or hold themselves out to carry either.

In the *Hubbard case,* No. 25, the amendment to the bill alleges that the company "is not a common carrier." (Tr. 6.) But the whole controversy arises over the fact that these companies are common carriers of passengers and that the interstate traffic must bear the burden resulting from the franchise ordinance lower intrastate rates. The interstate rates are published and collected in accordance with tariffs duly filed with the Commission and have been sustained as reasonable.

In *Tap Line Cases,* 234 U. S. 1, 24, 26, this Court, speaking through Mr. Justice Day, after citing authorities, laid down the broad proposition, "the extent to which a railroad is in fact used does not

determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business, which is the real criterion determinative of its character. * * * They (the tap lines) are engaged in carrying for hire the goods of those who see fit to employ them."

In *Terminal Taxicab Company* v. *District of Columbia*, 241 U. S. 252, the question was whether the taxicab company was a common carrier under the definition in the act which provided that every "public utility embraces every common carrier * * * controlling or managing any agency or agencies for public use for the *conveyance of persons or property* within the District of Columbia for hire." In holding the taxicab company subject to the jurisdiction of the Public Utilities Commission this Court, speaking through Mr. Justice Holmes, said, "It does business in the District, and the important thing is what it does, not what its charter says," and "No carrier serves all the public. His customers are limited by place, requirements, ability to pay, and other facts." Citing *Peck* v. *Chicago Tribune*, 214 U. S. 185, 190, Mr. Justice Holmes also said: "The public does not mean everybody all the time." (241 U. S. 255.)

In *Pacific Spruce Corporation* v. *McCoy*, 294 Fed. Rep. 711, 714, District Judge Wolverton, in an elaborate opinion which considered many cases, including the foregoing, said, "It is not essential for

constituting the utility a common carrier that it carry both passengers and freight, or that it carry all kinds of freight."

Tested by these principles, the two appellant companies are subject to the Interstate Commerce Act. The act itself provides the exceptions to which they are entitled when the circumstances warrant, as pointed out in the *Omaha Street Railway case*, 230 U. S. 324, 336.

Interurban electric railways have been regulated by the Interstate Commerce Commission almost from the time of its creation and the Congress had knowledge of that regulation when repeatedly enacting new legislation.[1]

> *Jurisdiction over Urban Electric Railways*, 33 I. C. C. 536.
>
> *St. Louis, Mo.–Illinois Passenger Fares*, 41 I. C. C. 584.

In *City of East Liverpool* v. *Steubenville, East Liverpool & Beaver Valley Traction Company*, 51 I. C. C. 563, the City itself invoked the jurisdiction of the Commission against one of these appellants; at least the City appears as the only complainant in the case.

In re Intrastate Fares, Chicago, North Shore & Milwaukee Railroad Company, 62 I. C. C. 188, 193, the *Omaha Street Railways Case* was distinguished.

In re Intrastate Rates within the State of Illinois, 66 I. C. C. 350, in a supplemental hearing the Commission considered the relation of the passenger

[1] See Appendix A, p. 15.

fares authorized by *Ex parte 74* and the intrastate rates and charges of electric railroads in Illinois.

This case is precisely what this Court held the Omaha Street Railway was not, as in that case this Court, speaking through Mr. Justice Lamar, said:

> But it is said that since 1887, when the act was passed, a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed. *We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight.* 230 U. S. 337.

II

That the paramount power of Congress through its appropriate agency to regulate interstate commerce may not be obstructed by State or municipal authority would seem also to be well settled by the recent decisions.

(*a*) *The paramount power of Congress*

In *Houston, East & West Texas Railway* v. *United States*, 234 U. S. 342, 350, 351, 352, this Court, speaking through Mr. Justice Hughes, said:

> First. It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to

regulate commerce among the several States. It is of the essence of this power that where it exists it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating state legislation." By virtue of the comprehensive terms of the grant the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 224; *Brown* v. *Maryland*, 12 Wheat. 419, 446; *County of Mobile* v. *Kimball*, 102 U. S. 691, 696, 697; *Smith* v. *Alabama*, 124 U. S. 45, 473; *Second Employers' Liability Cases*, 223 U. S. 1, 47, 53, 54; *Minnesota Rate Cases*, 230 U. S. 352, 398, 399.

Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*County of Mobile* v. *Kimball*, *supra*); "to foster, protect, control and restrain" (*Second Employers' Liability Cases*, *supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to

control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co.* v. *United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability Cases, supra*, pp. 48, 51;

Interstate Commerce Commission v. *Goodrich Transit Co.*, 224 U. S. 194, 205, 213; *Minnesota Rate Cases*, *supra*, p. 431; *Illinois Central Railroad Co.* v. *Behrens*, 233 U. S. 473.

In *Wisconsin Commission* v. *Chicago, Burlington & Quincy*, 257 U. S. 563, 588, this Court, speaking through Mr. Chief Justice Taft, said:

> It is objected here, as it was in the *Shreveport Case*, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original Interstate Commerce Act repeated in the amending acts, that the Commission is not to regulate traffic wholly within a State. To this the same answer must be made as was made in the *Shreveport Case* (234 U. S. 342, 358), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, can not exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso.

(b) *The Finding of the Commission that "Undue prejudice, undue preference and advantage, and unjust discrimination" exist is conclusive*

In *United States* v. *Tennessee*, 262 U. S. 318, 322, 323, this Court, speaking through Mr. Justice Brandeis, said:

> Whether a preference or discrimination is undue, unreasonable, or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case. *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170. The Commission may conclude that the preference given is not unreasonable, undue, or unjust, since it does not, in fact, result in any prejudice or disadvantage to any other person, locality, commodity, or class of traffic. On the other hand, preferential treatment of a class, ordinarily harmless, may become undue, because, under the special circumstances, it results in prejudice or disadvantage to some other person, commodity, or locality, or to interstate commerce.
>
> * * * * *
>
> The grant of a lower rate on road material to a government engaged in highway construction may benefit the government without subjecting to prejudice any person, locality, or class of traffic. But a lower rate may result in giving to a single quarry within the State all of the governmental business, so that competing quarries and localities within or without the State, or interstate traffic, would be

> prejudiced. That such undue discrimination does, and will, result from the order of the Tennessee commission was expressly found by the Interstate Commerce Commission. Its findings are necessarily conclusive, since the evidence on which it acted was not introduced in this suit. *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114.

(c) *The franchise ordinances may not overthrow the orders of the Commission*

In *New York* v. *United States*, 257 U. S. 591, 600, 601, the main argument of the State was that the New York Central Railroad was operating under a charter contract and only by abandoning its charter might it avoid the two-cent fare. Rejecting the argument *in toto*, and following the *Wisconsin Rate case*, this Court, speaking through Mr. Chief Justice Taft, said:

> The next objection is that the State has a charter contract with the New York Central Railroad Company by which the latter is bound not to charge more than two cents a mile for passenger carriage between Albany and Buffalo, and that if the Transportation Act permits the Interstate Commerce Commission by such an order to enable the railroad company to violate its contract, it impairs the obligation of a contract in violation of §10, Article I, of the Federal Constitution. That section provides that "no *State* shall * * * pass any * * * law impairing the obligation of contracts," and does not in its terms

> restrict Congress or the United States. But it is said that it deprives New York and her people of property without due process of law. We said in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 230, "Anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is State legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce." *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467. See also *Scranton* v. *Wheeler*, 179 U. S. 141, 162, 163; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 400.

The language of the Chief Justice was not *obiter dictum*. It was the direct, forceful, and conclusive adjudication of the main question raised in the issues made by the parties and which formed the very foundation of the suit.

The New York Central Railroad accepted its legislative charter on the condition that the passenger fares should not exceed two cents per mile. The Interstate Commerce Commission found that undue preference and unjust discrimination was created by reason of the two-cent fare. The Federal power to direct the removal of those preferences and discriminations was vigorously sustained.

The instant cases are in all respects similar. Undue preference and unjust discrimination has been found by appropriately constituted and designated authority after full hearing. If the franchise ordi-

nances are held to supersede the power of the Commission, then the so-called *New York Case* must be overruled as it may not be distinguished.

States and municipalities may not fix rates whether agreed to by the carriers or not which obstruct the Federal power.

III

In each case the decree of the District Court should be reversed with directions to dismiss the bill for want of equity.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

NOVEMBER 1, 1924.

APPENDIX A

(Ante, p. 6)

7 I. C. C. 83, *Rock Creek Railway*, a trolley line operating between Washington and Chevy Chase Lake, Maryland, held subject to the act.

13 I. C. C. 20, *Chicago & Milwaukee Electric Railroad*, an interurban electric railway carrying both freight and passengers, held subject to the act to regulate commerce; through routes and rates with connecting trunk lines denied on ground that satisfactory through routes already existed. "The act makes no distinction between railroads that are operated by electricity and those that use steam; nor has the Commission thought at any time to make such distinction."

13 I. C. C. 250, *Cedar Rapids & Iowa City Railway & Light Company*, a single-track railroad of standard gauge, operated by electricity, and which carried both freight and passengers, held subject to act and through joint rates directed, citing *Chicago & Milwaukee Electric* case.

19 I. C. C. 6, *Pacific Electric Railway*, a standard-gauge road with an aggregate mileage of 313 miles and ample equipment for the carriage of freight and passengers, denied through routes and joint rates with trunk lines on the ground that satisfactory through routes already existed.

20 I. C. C. 232, *Great Falls & Old Dominion Railroad*, an electric or trolley line 15 miles in length, treated as subject to the act and complaint attacking commutation fares dismissed on the merits.

20 I. C. C. 406, *Washington, Alexandria & Mt. Vernon Railway*, an electric railway company en-

gaged in the transportation of passengers and property between points in Virginia and Washington, treated as subject to the act and certain single-trip passenger fares condemned.

20 I. C. C. 486, *Cincinnati & Columbus Traction*, an interurban electrically operated line, found entitled to a switching connection with the Baltimore & Ohio and Norfolk & Western companies. (Order annulled, see *Baltimore & Ohio Southwestern Railroad Company* v. *United States*, 226 U. S. 14.)

22 I. C. C. 187, *Washington Railway & Electric* again held subject to act and certain increases in passenger fares were denied.

22 I. C. C. 201, *City & Suburban Railway of Washington*, which operated an electric line between Washington and Laurel, Md., a distance of 18.9 miles, held subject to act with respect to passenger traffic and ordered to comply with the provisions of statute respecting the filing and posting of tariffs.

24 I. C. C. 255, *Washington-Virginia Railway*, which operates a system of electric lines between Washington and Virginia points, treated as subject to the act and numerous passenger fares condemned, with directions that the company shall readjust its tariffs.

27 I. C. C. 499, *Indianapolis, Columbus & Southern Traction*, an interurban electrically operated railway carrying both freight and passengers, allowed through routes with connecting trunk lines. 34 I. C. C. 640, divisions established of joint rates maintained over the through routes of *Indianapolis, Columbus & Southern Traction*.

30 I. C. C. 593, *Washington-Virginia Railway* found guilty of discrimination in the application of commutation passenger fares between Washington and certain Virginia points.

30 I. C. C. 653, *Grand Rapids, Grand Haven & Muskegon Railway,* an electric line, allowed joint rates with the Crosby Transportation Company, a water line.

33 I. C. C. 448, *Grand Rapids, Grand Haven & Muskegon Railway,* an electric line carrying both freight and passengers, found discriminated against when through tickets were sold by trunk lines over other than its lines.

38 I. C. C. 281, *Tri-State Railway & Electric,* which appears to be a passenger-carrying line only within a very limited area, although between Ohio and West Virginia, was treated as subject to regulation by the Commission and certain fares were condemned as unreasonable.

41 I. C. C. 584, *Illinois Traction System,* composed of interurban electrically operated railways and carrying both freight and passengers, was treated as subject to the act; the *Omaha Street Railway Case,* 230 U. S. 324, was distinguished, and it was held that interstate fares prescribed by a municipal ordinance are not conclusively presumed to be reasonable, even if accepted by the interstate carrier as one of the conditions of a franchise.

42 I. C. C. 448, *Illinois Traction System,* again treated as subject to the jurisdiction of the Commission. See also 49 I. C. C. 64.

43 I. C. C. 417, *Hartford & New York Transportation Company,* an electric line operating almost wholly within Rhode Island, sought a readjustment of local interstate class and commodity rates by proposing to increase certain rates and to reduce others. The Commission found the proposed rates were justified.

49 I. C. C. 255, *Michigan Railway Company,* which operated an electric line between Grand Rapids and Kalamazoo, undertook to compel "through ticketing

of passengers and through checking of baggage between Grand Rapids and Chicago." The relief was denied on the merits and not for lack of jurisdiction.

51 I. C. C. 331, *Aurora, Elgin & Chicago Railroad*, an electric railway line extending from Chicago to Elgin and Aurora and carrying principally passengers but also conducting some freight business, made complaint of unreasonable charges for switching by connecting lines, which was denied on the merits.

51 I. C. C. 697, *Boise Valley Traction*, an electric traction line operating within the State of Idaho, complained of undue prejudice on account of rates in excess of the blanket rates in surrounding territory. Complaint sustained. The jurisdiction of the Commission appears to have been assumed.

52 I. C. C. 281, *Union Traction Company*, an interstate common carrier with 73 miles of standard-gauge main line equipped for electrical operation, denied through routes and joint class and commodity rates with trunk lines without any question of the jurisdiction of the Commission.

52 I. C. C. 366, *Louisville & Southern Indiana Traction Company* and *Louisville & Northern Railway & Lighting Company*, interurban electric railways operating between Louisville, Ky., and Jeffersonville, Ind., and Louisville and New Albany, Ind., respectively, sought to increase their passenger fares from 5 cents to 10 cents with provision for sale of commutation tickets at 7 cents per trip. With much opposition in which the question of jurisdiction was not raised, the Commission fixed the fare at 7 cents per trip.

55 I. C. C. 52, *St. Louis Electric Terminal Railway*, together with other lines comprising the Illinois

Traction System, consisting of about 425 miles of electric railroads, granted through routes for the transportation of freight, except coal, from and to points on the lines of New York Central Railroad.

57 I. C. C. 743, *Kansas City, Kaw Valley & Western Railway*, an electric line about 40 miles in length, extending from Kansas City, Mo., to Lawrence, Kan., denied an increase of rates on newspapers carried on passenger cars. The question of the jurisdiction of the Commission does not appear to have been raised.

58 I. C. C. 97, *Kansas City Railways Company*, an electric line which operated a belt extending from Dodson, Mo., into the section of the city of Kansas City, Mo., known as Westport, a distance of 8 miles, made application to increase freight rates on the belt, which was granted, without question being raised of jurisdiction.

58 I. C. C. 135, *Chicago, Lake Shore & South Bend Railway*, a standard-gauge electrically operated line between Chicago and South Bend, a distance of about 75 miles, and engaged mainly in the transportation of passengers, failed to sustain its complaint alleging discrimination on the part of trunk lines for failure to interchange traffic.

58 I. C. C. 270, *Hudson & Manhattan Railroad*, an electric railroad operated between New York City and Jersey City and Hoboken, was denied an increase to 8 cents in its interstate passenger fare of 6 cents between the two points named and Hudson Terminal, New York.

58 I. C. C. 455, the Commission in a very elaborate report established the pay of electric railway lines for carrying the mails.

58 I. C. C. 647, *Chicago, Lake Shore & South Bend Railway*, an electrically operated standard-gauge rail-

road and a common carrier of passengers and freight, granted through routes and joint rates with certain trunk-line connections.

59 I. C. C. 170, *Interstate Consolidated Street Railway Company* and *Rhode Island Company*, electric lines operating between certain points in Massachusetts and Rhode Island, permitted to publish and file tariffs of interstate fares.

59 I. C. C. 382, *Kansas City Railways Company*, an electric line operating between Dodson, Mo., and Kansas City, Mo., 8 miles, authorized to increase class and commodity rates over protests of shippers.

59 I. C. C. 404, *The Strang Line*, an electric railroad carrying both freight and passengers, successfully protested against tariffs of connecting lines which sought to cancel joint rates on various commodities.

59 I. C. C. 430, *Wheeling Traction Company*, treated as subject to the act and directed to cancel certain interstate passenger fares and schedules between points on its line.

60 I. C. C. 600, *Wheeling Traction Company*, which operates an electric railroad system in Ohio and West Virginia, adjudged guilty of preference and discrimination in maintaining rates for intrastate passengers lower than those for interstate passengers. In its report the Commission said: "Our jurisdiction over the Traction Company is not questioned."

61 I. C. C. 302, *Washington, Baltimore & Annapolis Electric Railroad*, an electric railroad operating 55 miles of line between Washington, Baltimore, and Annapolis with trackage agreements over the lines of other carriers, including the Washington Railway & Electric Company, with freight constituting but a

small portion of its traffic, treated as subject to the act and its interstate fares sustained as reasonable.

62 I. C. C. 188, *Chicago, North Shore & Milwaukee Railroad,* an interurban electric line which operates between Chicago and Milwaukee and intermediate points, treated as subject to the act and found to discriminate against interstate passengers by maintaining higher fares between interstate points than between intrastate points for similar distances.

62 I. C. C. 200, *Washington-Virginia Railway,* treated as subject to the act and certain increases in commutation fares approved in part.

64 I. C. C. 468, *Louisville & Northern Railway & Lighting Company* treated as subject to the act and passenger fares between Louisville and New Albany, Indiana, condemned; reasonable rates prescribed.

66 I. C. C. 449, *Terre Haute, Indianapolis & Eastern Traction Company, Dayton & Western Traction Company,* and other traction companies, treated as subject to the act and tariffs proposing certain increases in schedules of passenger fares ordered canceled.

66 I. C. C. 350, interstate rates and charges of electric railroads found to be unduly preferential of intrastate traffic and localities within the State and unduly prejudicial to interstate traffic and localities without the State. Previous reports, 59 I. C. C. 350; 60 I. C. C. 92.

69 I. C. C. 180, *Chicago, Lake Shore & South Bend Railway,* an electric line, increased its interstate fares under *Ex parte 74,* 58 I. C. C. 220. Lower intrastate fares found to discriminate against higher interstate fares and discrimination ordered removed.

69 I. C. C. 422, *Rhode Island Company,* which operates by electricity on the public streets of

Providence, performs a switching service, a passenger service, and a so-called trolley freight service. Practice of New Haven Railroad in refusing to absorb switching charges of Rhode Island Company found not unreasonable.

73 I. C. C. 19, *Cleveland, South Western & Columbus Railway,* an interurban electric line which owns no locomotives or cars suitable for interchange, which maintains no regular local freight service, which is primarily a passenger carrier whose freight revenues constitute but 12 per cent of its total operating revenues, treated as subject to the act.

73 I. C. C. 54, *Monongahela Power & Railway,* originally built for electric passenger service, with its lines wholly within West Virginia, but which now transports passengers, freight in carload and less-than-carload quantities, newspapers, and mails, held subject to the act and directed to publish and file schedules of its rates and charges, regulations, and practices applicable to the transportation of coal in interstate commerce.

74 I. C. C. 496, *Michigan Railroad Company,* which operates electric interurban lines wholly within the State of Michigan, treated as subject to the act, and trunk lines directed to establish through routes and joint rates therewith.

74 I. C. C. 593, *Fox & Illinois Union Railway,* an electric line 20 miles in length, operating wholly within the State of Illinois, not required to establish through routes and joint rates with connecting trunk lines.

77 I. C. C. 173, *Chicago, Lake Shore & South Bend Railway* found to discriminate against interstate passenger fares by maintaining lower intrastate fares between points wholly within the State.

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SUBJECT INDEX.

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STATEMENT 1–36

ARGUMENT:

I. THE COMMISSION HAS JURISDICTION OVER THE APPELLANTS, PENNSYLVANIA-OHIO POWER & LIGHT COMPANY AND THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY, AND OVER THE SUBJECT-MATTERS COVERED BY THE ORDERS OF NOVEMBER 7, 1921 36–50

II. THE LOWER COURT ERRED IN ENJOINING ENFORCEMENT OF THE COMMISSION'S ORDERS OF NOVEMBER 7, 1921 51–55

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, Interstate Commerce Commission, and Pennsylvania-Ohio Power & Light Company, Appellants, *v.* THE VILLAGE OF HUBBARD, OHIO, Appellee.	No. 228.

THE UNITED STATES OF AMERICA, The Steubenville, East Liverpool and Beaver Valley Traction Company, and Interstate Commerce Commission, Appellants, *v.* THE CITY OF WELLSVILLE, OHIO, Appellee.	No. 229.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

No. 228 is an appeal from a final decree of the District Court of the United States for the Northern District of Ohio, Eastern Division, enjoining enforce-

ment of an order of the appellant, Interstate Commerce Commission, hereinafter called the Commission, dated November 7, 1921, the body of which reads:

> This case being a proceeding instituted by the Commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:
>
> It is ordered, that the Pennsylvania-Ohio Power & Light Company be, and it is hereby, notified and required, to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger fares for the transportation of passengers in intrastate commerce between Hubbard, Ohio, and Youngstown, Ohio, which shall not be less than 20 cents when paid in cash, and $5 for 54 rides when a commutation ticket for this transportation is purchased.
>
> It is further ordered, that this order shall take effect on or before January 4, 1922, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6

of the interstate commerce act, and remain in force until the further order of the Commission. (Rec. 20.)

The order was made and entered in a proceeding before the Commission which was instituted under circumstances and conditions described by the Commission in its aforesaid report, as follows:

> This proceeding was instituted by us upon petition filed on behalf of the Pennsylvania-Ohio Power & Light Company, hereinafter referred to as the petitioner, which operates an electric line approximately 14.5 miles in length between the cities of Youngstown, Ohio, and Sharon, Pa., passing through the village of Hubbard, Ohio. The maximum distances from Youngstown and Sharon to Hubbard are 8.75 miles and 7.18 miles, respectively. The petition alleges that by reason of a franchise contract with the village of Hubbard, made in 1901 by its predecessor, the petitioner is unable to increase its passenger fares between Hubbard and Youngstown to the basis of its fares between Hubbard and Sharon, resulting in undue and unreasonable preference and advantage to persons traveling between Youngstown and Hubbard, and in undue prejudice and disadvantage to other persons traveling interstate between Sharon and Hubbard and to the city of Sharon, and also in unjust and unreasonable discrimination against interstate commerce. It is further alleged that petitioner's inability to increase its intrastate fares to a reasonable basis deprives it of sufficient revenue to pay

its operating expenses and the cost of maintaining its property devoted to said service. (Rec. 14.)

In setting forth facts pertaining to the subject-matter of complaint, the Commission further said:

> In 1917 the Youngstown-Sharon Street Railway Company, the original corporation owning the Youngstown-Sharon line, was merged with four other Ohio corporations and one Pennsylvania corporation under the name of the Mahoning & Shenango Railway & Light Company. This name was subsequently, in 1920, changed to the Pennsylvania-Ohio Electric Company. Later it became necessary to eliminate smaller portions of the railway operations, and on November 1, 1920, a new corporation, the Pennsylvania-Ohio Power & Light Company, the petitioner herein, was formed to take over the Youngstown-Sharon line. The entire common stock of the petitioner is owned by the Pennsylvania-Ohio Electric Company, but its bonds and notes are held by the public, as is also its preferred stock. The line acquired by the petitioner extends only to the Ohio-Pennsylvania State line, and the company operates into Sharon over the tracks of the Shenango Valley Traction Company. The petitioner acquired no power plant, but purchases power from the Ohio-Pennsylvania Electric Company on the basis of actual cost to generate.
>
> Petitioner maintains a regular interurban passenger service every half hour between

Youngstown and Sharon. It also maintains additional separate services between Hubbard and Youngstown and Hubbard and Sharon. Petitioner is also engaged in the transportation of freight, as will be later explained. Passenger fares only are involved.

A franchise ordinance passed by the village of Hubbard in 1901, and accepted by the Youngstown & Sharon Railway, one of the predecessors of petitioner, provided for the maintenance between Hubbard and Sharon of a cash fare of 13 cents, and between Hubbard and Youngstown of a cash fare of 12 cents. Between Hubbard and both cities the franchise required the maintenance of round-trip tickets at the rate of 20 cents, special tickets good for 22 rides for $2, and 54-trip commutation tickets for $3.80. These fares are still in effect on intrastate travel between Hubbard and Youngstown, and yield, in the order named, 1.37, 1.14, 1.04, and 0.81 cents per mile. Effective February 15, 1920, the Mahoning & Shenango Railway & Light Company, then operating the petitioner's line, by its tariff duly filed with this Commission, increased its one-way fare between Hubbard and Sharon to 20 cents, the price of a 54-trip commutation ticket to $5, and canceled the round-trip and special tickets between those points. Subsequently the Pennsylvania-Ohio Electric Company, successor to the Mahoning & Shenango Railway & Light Company, filed with this Commission its tariff I. C. C. No. 4, in which it proposed to establish the same fares between Hubbard

and Youngstown as those in effect between Hubbard and Sharon, above enumerated, and also to establish between Youngstown and Hubbard an 8-trip ticket for $1. It was also proposed to increase the one-way fare between Sharon and Youngstown from 30 to 35 cents, yielding 2.41 cents per mile, and the 54-trip commutation ticket between those points from $9 to $10, or to a basis of 1.27 cents per mile. This tariff became effective on interstate travel October 1, 1920, and was adopted by the petitioner, the successor to Pennsylvania-Ohio Electric Company, on November 25, 1920. A tariff carrying the same fares was rejected by the Public Utilities Commission of Ohio in so far as it attempted an increase in the fares between Hubbard and Youngstown on the ground that it was without jurisdiction to allow the establishment of rates and charges in excess of those prescribed by the franchise contract. Refusals of the Public Utilities Commission of Ohio to allow increases in fares in similar cases have been sustained by the Supreme Court of Ohio. The petitioner shows that prior to filing this petition it and its predecessors exhausted all means through negotiation with the village of Hubbard and otherwise to obtain relief from the franchise fares between Hubbard and Youngstown, but without avail.

The fare applicable to local traffic within the corporate limits of the village of Hubbard is 5 cents and within the corporate limits of Youngstown 9 cents. Petitioner does not seek an increase in these fares. However, under

the Hubbard franchise petitioner is also required to maintain the 5-cent fare between any point within the village and any point not exceeding 1.5 miles beyond the limits of the village in either direction. It developed at the hearing that petitioner seeks to limit the 5-cent fare to points within the village of Hubbard. It was also developed at the hearing that under an ordinance of the county commissioners of Mahoning County, Ohio, petitioner is also required to maintain a 5-cent fare between Youngstown and the Mahoning-Trumbull County line, which is 5.40 miles from petitioner's terminal in Youngstown. It desires to increase this fare to 10 cents. The petition on which the order of investigation herein is based, the evidence taken, and briefs filed all relate largely to the intrastate fares between Hubbard and Youngstown as compared with the interstate fares between Hubbard and Sharon. As the petition disclosed no complaint against the fare between Youngstown and the county line referred to the authorities of Mahoning County were not served with a copy of our order of investigation herein.

The fares proposed by petitioner between Hubbard and Youngstown—20 cents one way, 8 tickets for $1, and 54-trip commutation ticket for $5—yield revenue, per passenger-mile in the order named, of 2.29 cents, 1.43 cents, and 1.06 cents.

Evidence was submitted showing that industries, mercantile establishments, and amusement houses in Sharon compete with

those in Youngstown; that residents of Hubbard are employed at each place who travel daily back and forth over petitioner's line; also that many of Hubbard's residents likewise travel to one or the other of these points to purchase goods or for other purposes; and that in this transportation Sharon and its patrons are discriminated against by reason of the lower intrastate fares between Hubbard and Youngstown. The mayor of Sharon testified that there are workmen living in Hubbard who are employed at Sharon.

There are many ways in which a passenger may defeat the through fare between Sharon and Youngstown. By paying the combination fare to and from Hubbard the through fare is defeated by 3 cents; by paying the 20-cent fare to Hubbard and using a portion of a round-trip ticket between Hubbard and Youngstown which is good in either direction, the through fare is defeated by either 5 or 6 cents according to the price paid for round-trip ticket. Other combinations lower than the through fare can be made by using commutation tickets between Hubbard and Youngstown. While the petitioner's tariff contains a provision against fare splitting the impossibility of enforcing it is asserted.

The following table taken from exhibits of record gives a summary of passenger revenue and operating expenses for the year 1920, and, based on the traffic during January, 1921, estimates of what the result of operation will be for the entire year 1921, under the present fares, and what it would be under the pro-

posed fares. The figures submitted do not include any reserve for depreciation, renewals, or for interest on funded and unfunded debt. With the exception of a few items directly related to freight traffic, which were omitted, all of the operating expenses were charged to passenger traffic.

	Actual for 1920.	Estimate for 1921 (present fares).	Estimate for 1921 (proposed fares).
Revenue	$332,173.43	$367,529.22	$417,127.00
Operating expenses:			
Way and structures	48,164.07	65,500.00	65,500.00
Equipment	67,544.52	63,600.00	63,600.00
Power	46,327.22	37,600.00	37,600.00
Transportation	107,005.25	129,400.00	129,400.00
Traffic	595.55	1,200.00	1,200.00
General and miscellaneous	52,129.58	54,000.00	54,000.00
Taxes	23,309.36	23,779.07	24,491.94
Total expenses and taxes	345,075.55	375,079.07	375,791.94
Balance	[1] 12,902.12	[1] 7,549.85	41,335.06

[1] Deficit.

It will be noted that the estimated cost of power in 1921 is substantially lower than the 1920 cost. This is due to the fact that the power is purchased at the switchboard cost and a reduction in the cost of coal is estimated. Power cost in 1920 was 1.42 cents per kilowatt hour and the 1921 estimate is 1 cent.

It is shown that in 1920 the operations between Hubbard and Youngstown were conducted at a loss of $31,264.06, as compared with a profit of $18,361.94 between Hubbard and Sharon. The petitioner esti-

mates that in 1921 it will transport 1,897,890 intrastate and 1,180,607 interstate passengers, and that at the present fares the intrastate passenger traffic will yield $162,721 as against $204,808 from the interstate passenger traffic. In other words, intrastate traffic, constituting 61.7 per cent of the total traffic, will yield but 44.5 per cent of the total revenue, resulting in a deficit for the entire operation of $7,549.85, as shown above. It estimates that under the proposed fares the Youngstown-Hubbard deficit would be turned into a profit of $16,399.25.

The petitioner has connections, one direct and the other over a private siding, at Masury and at Stop 41, both east of Hubbard, with the New York Central Railroad, and while petitioner does not originate and deliver freight traffic to this line, it received from it, during the year 1919 and 1920, 922 cars of freight for delivery chiefly at points on the petitioner's line. The New York Central forms a connecting link between petitioner's line and other trunk lines. The petitioner also operates a daily less-than-carload freight service between Youngstown and Sharon, and on three days a week operates a through car between Sharon and New Castle, Pa., via Hubbard and the Sharon & New Castle Railroad. The petitioner also participates with other electric lines in through freight rates from points on its line to Cleveland and Toledo, Ohio, Detroit, Mich., and other points. In 1919, the less-than-carload freight amounted to 6,240 tons and produced a revenue of $18,000, and the

> carload and switching revenue was $6,246.52. The total, $24,246.52, amounted to about 7 per cent of the gross earnings. In 1920 the less-than-carload tonnage was 5,474 and produced a revenue of $21,221, and the carload and switching traffic yielded $5,259. The total, $26,480, was 7.4 per cent of the gross earnings of the petitioner for that year.
>
> The petitioner submitted a valuation of its physical properties, but for the purposes of this investigation it is unnecessary to discuss it. Without consideration of returns on any value whatever, deficits are encountered. (Rec. 14–18.)

In summarizing contentions made by the village of Hubbard, the appellee herein, in the proceeding before the Commission, and in stating its conclusions in the premises, language used by the Commission was as follows:

> The position of the village of Hubbard is summed up in a statement contained in its brief as follows:
>
> "To the claim made by the petitioner that the rates of fare fixed and prescribed by the terms of said franchise ordinance do not provide sufficient compensation or income to maintain proper service and afford a sufficient return on the capital invested, our answer is that this is not the concern of the village of Hubbard, for a bargain is a bargain, and a contract duly entered into by persons competent to enter into it is binding upon all parties and can not be modified or changed without the consent of

all parties. The street railway company had an equal opportunity with the village of Hubbard of looking into the future and foreseeing conditions that might arise, and accepted the contract with its burdens as well as its privileges. The evidence shows that ever since the acceptance of the ordinance in 1901 this company has collected these rates of fare provided by the ordinance, while other companies in other localities were carrying passengers for a less rate of fare over a similar distance, and in justice to all they must consider the fat years with the lean ones, and in so considering a much greater period of time elapsed between 1901 and 1917, when expenses increased and earnings fell off more than from the latter date to the present time, of which the petitioner complains."

The answer to this is that if the maintenance of fares fixed by a franchise contract results in unjust discrimination against interstate commerce, it is within our power to remove it by prescribing other and different intrastate fares.

It is not shown that the present interstate fares between Hubbard and Sharon or between Sharon and Youngstown are unreasonable. On the other hand they appear to be relatively lower than fares maintained by other electric interurban railways in Ohio in the same general territory. For illustration, the fares of the Youngstown & Suburban Railway, extending from Youngstown to Leetonia, 19 miles, and of the Northern Ohio Traction &

Light Company, extending from Cleveland to Urichsville, 103 miles, are on a basis of approximately 3 cents per mile.

We are of opinion and find that the interstate passenger cash and 54-ride commutation fares of the Pennsylvania-Ohio Power & Light Company between Sharon and Hubbard, also the interstate passenger fares between Sharon and Youngstown, are just and reasonable fares for interstate transportation between those points; and that the maintenance of corresponding intrastate fares between Hubbard and Youngstown lower than the just and reasonable interstate fares between Sharon and Hubbard has resulted and will result in undue prejudice to persons traveling in interstate commerce over the petitioner's line in the state of Ohio and between points in the state of Ohio and Sharon, Pa.; in undue preference and advantage to persons traveling intrastate between points in Ohio; and in unjust discrimination against interstate commerce.

We further find that, whether the aforesaid passenger fares pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services are performed by the petitioner under substantially similar circumstances and conditions; and that said undue prejudice and preference and unjust discrimination can and should be removed by establishing intrastate passenger cash and 54-ride commutation fares between Hubbard and Youngstown not less than the interstate passenger fares herein found reasonable between Hubbard and Sharon. (Rec. 18–19.)

The first hearing in the lower court was upon a motion for a preliminary injunction, which was granted for reasons set forth in an opinion of the court to which we will later refer. The views expressed and the conclusions stated in said opinion were adhered to by the court on final hearing and made the basis of its final decree.

In accordance with a stipulation of counsel for the parties, the record on final hearing was made up as follows:

1. Bill in equity and exhibits.
2. Report, findings, and order of the Interstate Commerce Commission.
3. Motions of the United States and the other defendants to dismiss the bill in equity.
4. Intervention and answer of the Interstate Commerce Commission and exhibits.
5. Answer of the Pennsylvania-Ohio Power & Light Company.
6. Motion of plaintiff for preliminary injunction.
7. Order granting preliminary injunction and overruling motions to dismiss the bill in equity. (Rec. 43–44.)

In its opinion the lower court referred to jurisdictional provisions contained in the interstate commerce act and in section 209 and Title III of the Transportation Act. Also, it reviewed certain decisions of this court, including the decision in *Omaha & Council Bluffs Street Railway Company* v. *Interstate Commerce Commission,* 230 U. S. 324. In summarizing the jurisdictional provisions the lower court said:

Summarizing and bringing together the references to carriers above quoted otherwise than by railroad, we find street electric railways referred to in these several words: In section 1, paragraph 22, it is "street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation." In section 15, as amended June 18, 1910, and reenacted February 28, 1920, the reference is to "street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business." In new section 15a the reference is to "street or suburban electric railways unless operated as a part of a general steam railroad system of transportation." Also to "interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight." In new section 20a the reference is to "street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation." In section 209, Title II, transportation act of 1920, the reference is to "a street or interurban electric railway * * * which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic." In section 300, Title III, the reference is "a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

> Despite these differences in phraseology there is a marked similarity in the characteristics attributed to street electric railways which include them within the jurisdiction of the Commission. These characteristics are (*a*) being operated as a part or parts of a general steam railroad system of transportation; (*b*) engaged in the general business of transporting freight in addition to their passenger and express business; (*c*) having as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both. In the varied instances street electric railways, whether urban, suburban, or interurban, which do not have these characteristics are excluded from the jurisdiction of the Commission. If they have those characteristics, obviously they would be under the jurisdiction of the Commission. This being true, does it not follow that defendant's railway, even though an interurban electric railway engaged in the interstate transportation of passengers, must be regarded as outside the jurisdiction and control of the Commission unless it possesses one or more of these distinguishing characteristics? * * *. (Rec. 38.)

In stating its conclusions the lower court further said:

> From the foregoing considerations we deduce these conclusions: Electric street, suburban, or interurban railways are included within "common carriers by railroad," as that expression is used in section 1 of the interstate commerce act, only when they are

of that character and engaged in that kind of traffic and under the conditions set forth in the parts of the interstate commerce act and the transportation act of 1920 as above quoted. They must be operated as a part or parts of a general steam railroad system of transportation; they must be engaged in the general business of transporting freight in addition to their passenger and express business; or they must be operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. If they are not thus engaged or being thus operated, they are not within the act nor within the jurisdiction conferred on the Interstate Commerce Commission, even though they may be engaged in interstate passenger business. * * *. (Rec. 41.)

The remaining inquiry is whether or not, on the facts found by the Interstate Commerce Commission, the defendant railway was operated as a part of a general steam railroad system of transportation or was engaged in the general transportation of freight in addition to its passenger and express business. Plainly and admittedly, the defendant railway was not operated as a part of a general system of steam railroads for transportation. It had two switching connections, one direct and the other over a private siding, with the New York Central, a system of steam railroads, but it was independently operated, and not as a part of that system. Its traffic relations with the New York Central were limited to receiving

over these switches a few carloads of inbound freight; and, so far as the New York Central is concerned, delivery was made and demurrage began to run as soon as those cars were received by the defendant railway. Nor can it be said upon the facts found that the defendant railway was engaged in the general transportation of freight in addition to its passenger and express business. It is true that the Commission's report refers thereto as less-than-carload freight, but this freight service appears to have consisted of packages and parcels, and is more nearly like that which is called express than freight traffic. In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent of the gross earnings of the defendant company. Such an incidental and relatively insignificant and unimportant freight business can not be called the general transportation of freight in addition to its express business.

Our conclusion is that the order of the Interstate Commerce Commission is in excess of any power and jurisdiction conferred upon it by the interstate commerce act, and is void and without effect. The motion to dismiss will be denied, and a preliminary injunction will be granted as prayed. (Rec. 42.)

No. 229 is also an appeal from a final decree of the lower court, enjoining enforcement of an order of the Commission, dated November 7, 1921, which is in substance as follows:

This case being a proceeding instituted by the Commission upon petition filed, and hav-

ing been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the Steubenville, East Liverpool & Beaver Valley Traction Company be, and it is hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger fares for the transportation of passengers in intrastate commerce between points on its line within the State of Ohio found in said report to be just and reasonable for the future.

It is further ordered, That this order shall take effect on or before January 6, 1922, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and remain in force until the further order of the Commission. (Rec. 15.)

The order was made and entered in a proceeding before the Commission, which was instituted under circumstances and conditions described by the Commission in its report, as follows:

This proceeding was instituted by us upon petition filed on behalf of the Steubenville,

East Liverpool & Beaver Valley Traction Company, hereinafter called the traction company, operating an electric interurban line between Vanport, Pa., and Steubenville, Ohio, and intermediate points, and also a local service between certain points within Ohio, and a branch line to Chester, W. Va. In substance the petition alleges that by reason of various franchises, ordinances, and regulations imposed under authority of certain municipalities of the States of Ohio and Pennsylvania, the petitioner is unable to increase its fares for the transportation of passengers intrastate to the basis maintained on interstate traffic, resulting in undue and unreasonable advantage and preference to persons and localities in intrastate commerce on the one hand and in undue prejudice and disadvantage to other persons and localities in interstate commerce on the other hand, and also in unjust and unreasonable discrimination against interstate commerce; and, further, is deprived of sufficient revenue to pay its operating expenses, including taxes and the cost of maintaining its property devoted to the service. Passenger fares only are involved. (Rec. 7.)

In setting forth facts pertaining to the subject-matter of complaint, the Commission further said:

The main line of the traction company, which is double tracked, extends along the Ohio River from Vanport, Pa., west to the Pennsylvania-Ohio State line, hereinafter referred to as State Line, thence in a general southerly direction to Steubenville, Ohio, a

total distance of 40.2 miles. Of this trackage 11.4 miles are in Pennsylvania and 28.8 miles in Ohio. The line passes through various cities, townships, villages, and boroughs, including Midland and Glasgow, Pa., East Liverpool, Wellsville, and Toronto, Ohio.

* * * * *

Besides a coal branch there are six branch lines engaged in transporting passengers, four in East Liverpool and two in Steubenville. * * *. The main line and also the branches are, for the greater distances, upon private rights of way, but where they pass through towns and villages they are generally upon streets and highways.

The company maintains an hourly interurban passenger service upon its main line between Vanport and Steubenville. Passengers, however, are required to change cars at the diamond in East Liverpool. The traction company handles no baggage as such. A daily freight service is maintained between Steubenville and Midland, Pa., and a through car runs from Steubenville to Beaver, Pa., a point on the Beaver Valley Traction line a few miles east of Vanport, as often as the traffic demands, which at time of hearing was about once a week. Except for this traffic to Beaver the traction company handles only freight local to its line. No freight is handled oven [over] the branch lines. The traction company files its tariffs with this Commission, and publishes interstate passenger fares between points on its lines. It is subject to our

jurisdiction. *City of East Liverpool, Ohio,* v. *S., E. L. & B. V. T. Co., supra.*

At Vanport the traction company connects with the Beaver Valley Traction Company, which in turn connects with the Pittsburgh & Lake Erie Railroad at Beaver. It is stated that as a result of these connections the traction company receives at Vanport full carloads of passengers destined to various points along its line. The Wheeling Traction Company transports large numbers of passengers into Steubenville from Wierton, Follansbee, Wellsburg, and Wheeling, W. Va., and from Bridgeport, Mingo, and other places on the Ohio side of the river, who avail themselves of the facilities of the traction company to reach points between Steubenville and Vanport.

The interstate fares of the traction company now in effect are published in its tariff(s) I. C. C. No. 8. This tariff publishes, among others, fares for through service between Vanport and Steubenville and between all points on its main line both in Pennsylvania and Ohio. It contains no provision for free transfers.

A tariff naming the same scale of fares as carried in I. C. C. No. 8 was permitted to become effective September 20, 1920, by the Public Service Commission of Pennsylvania, but a similar tariff was rejected by the Public Utilities Commission of Ohio on the ground that the fares charged by the traction company in that State were regulated by municipal ordinances and franchises granted to its prede-

cessors and therefore beyond the power of the State authorities to change. Under the terms of franchise ordinances of Wellsville and East Liverpool the traction company is prohibited from charging more than 5 cents for the transportation of passengers between the eastern limit of East Liverpool, which is State Line, and the boundary line between Columbiana and Jefferson Counties, which is approximately the western limit of Wellsville, a distance of 10.7 miles. In addition it is required to furnish free transfers to branch-line points in East Liverpool, except to Chester. The interstate fare from State Line to Woosters, which is also approximately at the western limit of Wellsville, a distance of 10.4 miles, is 20 cents.

By franchise ordinances of the village of Toronto the traction company is required to charge a fare not in excess of 5 cents between Fosterville and Costonia, 4.2 miles, with 13 tickets for 50 cents. These two points are between Country Club and Minors, south of the county line, and the interstate fare between these latter points is 20 cents for 7.2 miles. By franchise ordinances of Steubenville, the traction company may not charge more than 5 cents within that city, or six tickets for 25 cents, with free transfers. This was modified on April 8, 1919, so as to allow a fare of not more than 6 cents, or nine tickets of [for] 50 cents, with free transfers. The increase was limited to expire April 8, 1921. The interstate fare over the interurban line from the city limits of Steubenville to the end

of the line at Sixth Street, 1.7 miles, is 10 cents. The interstate fare over the branch lines in Steubenville is 8 cents, except that between Crawford Avenue and Wellesley Avenue, 4.32 miles, it is 16 cents.

The interstate fare between Smiths Ferry, Pa., and Woosters, Ohio, 11.7 miles, is 25 cents, while the intrastate fare between State Line and Woosters, 10.4 miles, is 5 cents. The fare from Smiths Ferry to State Line is 10 cents and from State Line to Woosters, intrastate, 5 cents. Through passengers may therefore defeat the interstate fare to the extent of 10 cents a trip by buying tickets or tendering cash fares to and from State Line. The interstate fare from East Midland, Pa., to Country Club, Ohio, 29.7 miles, is 65 cents, while the intrastate fare from State Line to Country Club, 24.5 miles, is 40 cents. Here, also, by the use of the intrastate fare from State Line to Country Club, the interstate fare may be defeated to the extent of 10 cents. In the interurban service interstate passengers and intrastate passengers ride in the same cars and over the same rails.

In the following table interstate interurban fares between representative Ohio points on the traction company's line, provided in tariff I. C. C. No. 8, are stated with earnings per mile thereunder. These are compared with the fares and earnings under the intrastate scale between the same points.

From—	To—	Distance.	Interstate.		Intrastate.	
			Fare.	Earnings per passenger-mile.	Fare.	Earnings per passenger-mile.
		Miles.	*Cents.*	*Cents.*	*Cents.*	*Cents.*
State Line	East Liverpool (terminal)	3.8	10	2.63	5	1.31
Do	East Liverpool (diamond)	4.1	15	3.66	5	1.22
Do	Woosters (western limit of Wellsville)	10.4	20	1.92	5	.48
Woosters	Kountz	3.9	10	2.56	5	1.28
Steubenville (city limits)	Country Club	2.6	10	3.84	5	1.92
Country Club	Jeddo	3	10	3.33	10	3.33
Jeddo	Myers Lane	2	10	5	5	2.5
Myers Lane	Minors	2.2	10	4.54	10	4.54
State Line	Steubenville (city limits)	27.1	60	2.21	45	1.66
Do	Steubenville (Sixth Street)	28.8	65	2.26	51	1.77
Country Club	East Liverpool (diamond)	20.4	50	2.45	40	1.96
Myers Lane	State Line	19.5	45	2.3	35	1.79

The lower intrastate fares have had the effect of practically denying to the traction company the use of its interstate fares. For example, the through interstate fare from Vanport to the terminus of the line at Sixth Street, Steubenville, 40.2 miles, is 90 cents. A passenger boarding a car at Vanport and stating his destination as State Line will pay a fare of 30 cents; he can then pay an intrastate fare of 51 cents from State Line to Steubenville, thus defeating the interstate fare by 9 cents. The interstate fare from Vanport to Woosters is 45 cents. A passenger stating his destination as State Line can pay 30 cents to that point and then the intrastate fare of 5 cents to Woosters, defeating the interstate fare by 10 cents. The same relative situation exists going in the reverse direction from

Steubenville, and examples could be multiplied.

It is to be noted that between points in Ohio on the traction company's line where fares are not held down by municipal franchises and ordinances the intrastate and interstate fares are more nearly on a parity. For example, between Country Club and Jeddo, 3 miles, and between Myers' Lane and Minors 2.2 miles, the intrastate fares are the same as the interstate, 10 cents; also between the city limits of Steubenville and Jeddo, 5.6 miles, the intrastate fare is 15 cents, the same as the interstate fare.

In the interurban service between Vanport and Steubenville and intermediate points the fares increase 5 cents for each zone. The minimum fare provided in the interstate schedule is 10 cents. This is not, strictly speaking, a minimum fare, although usually so designated in the record, but is in fact an initial fare, and by the manner in which it operates results in the collection of an additional amount of 5 cents. For illustration, three 5-cent zones are included from State Line to Woosters, but by reason of this initial fare a passenger boarding an interurban car at State Line for Woosters pays a fare of 20 cents. If this were a minimum charge the fare would be 15 cents. A minimum fare of 10 cents in interurban service appears to be reasonable and has been approved in numerous instances by the Public Service Commission of Pennsylvania and the Public Utilities Commission of Ohio, but no sufficient justification

has been shown on this record for the collection of this amount as an initial fare; provided, however, that this is not to be construed as requiring the maintenance of any interstate fare between points on the traction company's line lower than the intrastate fare contemporaneously maintained between the same points.

The traction company also maintains a local interurban service between State Line and Woosters, the western limits of Wellsville, 10.4 miles, operating through the city of East Liverpool, East Liverpool Township, and Wellsville. The present intrastate fare for this service, as hereinbefore stated, is 5 cents, with free transfers to branch-line points in East Liverpool. This fare yields less than 5 mills per mile. Under its tariff I. C. C. No. 8, the traction company divides this local service into three zones: (1) State Line to diamond in East Liverpool, 4.1 miles; (2) diamond to Kountz, 2.4 miles; (3) Kountz to Woosters, 3.9 miles. An interstate fare of 5 cents is provided for each zone with no transfers. For these respective distances this 5-cent fare yields per passenger-mile revenues of 1.22, 2.08, and 1.28 cents. A 5-cent fare, therefore, for each of these zones would appear amply justified. The evidence shows that because of the lower intrastate fare the interstate local fares are defeated and the traction company has seldom been able to derive any benefit from them. For example, the interstate fare from Vanport to Woosters is 45 cents. A passenger boarding a car at Vanport with

Woosters as his intended destination, by paying the fare of 30 cents to the State Line and then the local intrastate fare of 5 cents to Woosters, effectually evades the payment of the interstate fare from Vanport to Woosters as well as the interstate fare from State Line to Woosters. There is considerable traffic on this local division, the number of revenue passengers for the year ended December 31, 1920, being shown as 3,227,652.

The intrastate fare in effect over the city or branch lines above referred to is 5 cents, except when transfers are used. The interstate fare is 8 cents, except that between Crawford Avenue and Wellesley Avenue, in Steubenville, as above shown, it is 16 cents.

The traction company asserts that because of the low intrastate fares it is unable to secure sufficient revenue to pay the cost of operating and maintaining its railway and taxes thereon; that its bond interest is in default of payment for more than a year; and that the costs of the railway are continually increasing. It is shown that the line in many respects is in a run-down condition. Many bridges and trestles should be immediately repaired or renewed, but the company is unable to remedy this condition because of lack of funds. It has sought relief from the several Ohio municipalities which control the intrastate fares, also from the Ohio Legislature, but without avail. It is averred that unless relief is granted by this Commission by removing the unjust discrimination complained of by raising the intrastate fares to the level of

the interstate fares it will be compelled in the near future to discontinue its functions as an interstate carrier.

The following table summarizes the results of operation for the years 1918, 1919, and 1920:

	1918	1919	1920
Income	$770,167.50	$840,600.62	$949,171.49
Operating costs	601,980.59	725,893.91	865,997.12
Net income	168,186.91	114,706.71	83,174.37
Taxes	53,932.99	58,841.96	66,441.94
Net income less taxes	114,253.92	55,864.75	16,732.43
Interest on bonds	74,150.00	74,150.00	74,150.00
Interest on unfunded debt		4,650.00	
Interest on deposits	3,705.10	6,173.93	4,799.24
Surplus	43,809.02	[1] 16,761.32	[1] 52,618.33

[1] Deficit.

Interest on bonds has not been paid since November, 1919. Wages of conductors, motormen, and trainmen increased from $148,841.25 in 1918 to $162,057.99 in 1920 and $197,522.49 in 1921, and during those years the cost of power purchased more than doubled, increasing from $60,606.01 in 1918 to $114,196.20 in 1919, and again to $134,613.14 in 1920.

The freight earnings reported in the traction company's annual reports under express were in 1919, $14,864.79 and in 1920, $23,018.09. The evidence indicates that these freight revenues exceed the freight operating expenses.

The traction company also submitted statements of passenger earnings on various portions of its system, but in preparing these figures it charged to passenger traffic the

entire operating expenses of the line. In the city of Steubenville, during the year 1920, the passenger earnings, less operating expenses, were $20,821.65 on the interurban line, $3,759.57 on the Fourth Street line, and $4,216.18 on the La Belle View line; a total of $28,797.40. Between Fosterville and Costonia there was a deficit of $5,725.20, and south of the county line the interurban line earned an excess of $17,491.36 over operating costs. Between the State and county lines there was a deficit of $53,862.89, of which $38,757.42 was on the main line. The only branch line in the city of East Liverpool showing a profit was the Chester line. It earned a profit in Ohio of $5,107.75, and in West Virginia of $18,882. The total number of passengers handled on the entire line during the year 1920 was 10,720,707.

Evidence offered by the Ohio municipalities shows that certain relief has been offered to the traction company, but that the company has refused to accept it. The traction company shows that whatever relief has been offered has always been accompanied with such further restrictions as to make its acceptance of doubtful value; and that, as a result of the interlocking nature of the franchises and ordinances of the different municipalities, it is practically impossible to get them in agreement on any measure of relief. (Rec. 7–13.)

In summarizing contentions made by the city of Wellsville, appellee herein, in the proceeding before

the Commission, and in stating its conclusions in the premises, the language of the Commission was as follows:

> It is contended by the municipalities (*a*) that jurisdiction does not lie in this Commission to alter the fares fixed by ordinance or franchise; and (*b*) that the merger of electric railways originally performing purely intrastate and principally city street-car service into the present operating company does not change their original status. As to the latter contention, it is sufficient to say that whatever may have been the original service afforded by the respective railways at the time of the merger, the traction company now is carrying on much more than a street-railway business. In its interurban operations it now assumes the status of an electric railway, and as such it is engaged in interstate transportation.
>
> As to the first contention: There is not encountered here the usual assumption on the part of the State of jurisdiction over such service, the State of Ohio not having withdrawn from municipalities the franchise privilege and power over highways. There is encountered, however, an exceptional assumption of extraterritorial jurisdiction by municipalities. While under the Omaha street-railway decision, *Omaha & C. B. St. Ry. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, it may consistently be argued that this Commission has no jurisdiction over a city street-car line and may not impose

rates and conditions for local service other than those stipulated in a franchise, it is not seriously to be contended that the Federal Government in its efforts to maintain facilities of interstate communication and to prevent discrimination is to be prevented by municipalities which, in franchises involving the use of their local streets, assume to regulate the rates to be charged to and between other cities; and particularly when such franchises impose rates which, under present conditions, obviously are unjust and which menace maintenance of interstate transportation facilities and service.

We are not satisfied on this record that we are warranted in disturbing the intrastate basis of fares now in effect on petitioner's branch or city lines, nor are we convinced that the issuance of transfers as now in effect intrastate is unreasonable in connection with fares for interstate travel, provided, however, that such transfers to the interurban line between Vanport and Steubenville, or to local cars operating between State Line and Woosters, should be valid for transportation over one zone only.

We are of opinion and find, subject to the reservations above noted with respect to the initial fares, fares on branch or city lines, and the issuance of transfers, that the interstate passenger fares of the traction company between Vanport and Sixth Street, Steubenville, and intermediate points, and designated as "through service rates" in its tariff I. C. C. No. 8, and the interstate passenger fares

between East Liverpool (State Line) and the diamond in East Liverpool; between the diamond and Kountz; and between Kountz and Woosters, as published in the traction company's tariff I. C. C. No. 8 among its list of rates designated "local service rates," are just and reasonable interstate fares for the respective services between those points; and that the maintenance of intrastate fares between the same points lower than the just and reasonable interstate fares has resulted and will result in undue prejudice to persons traveling in interstate commerce over the traction company's lines in the State of Ohio and between points in the State of Ohio and points in the State of Pennsylvania; in undue preference of and advantage to persons traveling intrastate between points in Ohio; and in unjust discrimination against interstate commerce.

We further find that, whether the aforesaid passenger fares pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services are performed by the traction company under substantially similar circumstances and conditions; and that said undue prejudice and preference and unjust discrimination can and should be removed by establishing intrastate passenger fares not less than the interstate passenger fares herein found reasonable; provided, however, that the fares herein authorized are for application in connection with through travel, irrespective of municipal limits, or the interurban operations of petitioner, and

> nothing herein is to be construed as authorizing any change in the fares as now in effect on the traction company's line for transportation of passengers who begin and end their journey within the limits of any municipality. (Rec. 13–15.)

In this case, also, the first hearing in the lower court was upon a motion for a preliminary injunction, which was granted for reasons set forth in the opinion of the court hereinbefore mentioned, and applied by the court to this case in the language following:

> This suit is the counterpart of the *Village of Hubbard* vs. *The United States et al.*, this day decided. It was heard, argued, and submitted at the same time, and involves substantially similar facts and precisely the same questions of law. These questions likewise arise upon plaintiff's application for a preliminary injunction and upon motion of defendants, the United States and the Steubenville, East Liverpool & Beaver Valley Traction Company, to dismiss, and upon answer to the merits filed by the Interstate Commerce Commission setting up its order and its findings of fact. The same conclusion and judgment is required.
>
> The general situation is correctly set forth in the report of the Interstate Commerce Commission, and need not be repeated here. The defendant railway, upon the facts as found, is a street and interurban electric passenger railway and is not engaged in the general business of transporting freight in addition to its passenger and express business, nor is it operated

as a part of a general steam railroad system of transportation, nor in the general transportation of freight. The amount of freight business done by it is proportionately less, and relatively more unimportant, than in the Village of Hubbard case. In the company's annual reports its gross receipts from these freight earnings are reported under express earnings. The company is not, in our opinion, subject to the jurisdiction and regulation of the Interstate Commerce Commission for the reasons set forth in our opinion in the Village of Hubbard case.

The motion to dismiss will be denied. A preliminary injunction will be granted as prayed. (Rec. 33-34.)

In accordance with a stipulation of counsel for the parties, the record on final hearing was made up as follows:

1. Bill in equity and exhibits.
2. Report, findings and order of the Interstate Commerce Commission.
3. Motions of the United States and the other defendants to dismiss the bill in equity.
4. Intervention and answer of the Interstate Commerce Commission, and exhibits.
5. Answer of the Steubenville, East Liverpool & Beaver Valley Traction Company and exhibits.
6. Motion of plaintiff for preliminary injunction.
7. Order granting preliminary injunction and overruling motions to dismiss the bill in equity,

8. As between the plaintiff and the Steubenville, East Liverpool & Beaver Valley Traction Company only, copies of the ordinances numbered 181, 408, 594, and 610 and 649 admitted in evidence by order of court over the objections and exceptions of the counsel for the United States and the counsel for the Interstate Commerce Commission who protest that the same are not properly a part of the record on any issue in the case. (Rec. 67.)

In discussing in these cases points covered by the assignments of error, we will endeavor to show that the court erred in holding that the Commission is without jurisdiction over either the appellants, Pennsylvania-Ohio Power & Light Company and The Steubenville, East Liverpool & Beaver Valley Traction Company, to whom the orders of November 7, 1921, were directed, or over the subject-matters covered by the orders, and erred also in enjoining enforcement of the orders.

ARGUMENT.

I.

THE COMMISSION HAS JURISDICTION OVER THE APPELLANTS, PENNSYLVANIA-OHIO POWER & LIGHT COMPANY AND THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY, AND OVER THE SUBJECT-MATTERS COVERED BY THE ORDERS OF NOVEMBER 7, 1921.

We think the jurisdictional provisions referred to by the lower court in support of its conclusion that the Commission is without jurisdiction over either

the carriers or the subject-matters, covered by the orders of November 7, are inapposite, for the reason that they pertain to matters other than those to which the orders apply. In this connection we will comment first upon the provisions referred to by the lower court which are included in certain sections of the interstate commerce act.

The restrictions contained in paragraph (22) of section 1 relate to authority conferred upon the Commission by paragraphs (18) to (21), inclusive, of that section, in connection with the extension, construction, acquisition, operation and abandonment by carriers subject to the act of lines of railroad.

The restrictions in paragraph (3) of section 15 relate to authority conferred upon the Commission to establish through routes, and joint rates, fares, charges, classifications and practices applicable to such routes.

The restrictions in paragraph (1) of section 15a relate to what is known as the group theory of establishing rates and the disposition of earnings of individual carriers in excess of 6 per cent of the value of the property used by the carrier in making the earnings, with certain exceptions which are unimportant in connection with the matter under consideration here.

The restrictions in paragraph (1) of section 20a relate to securities to be issued by certain carriers and liabilities in connection therewith to be incurred by the carriers.

It will be observed that none of the jurisdictional provisions mentioned is directly connected with any of the subject-matters covered by the orders of November 7. Instead of tending to show that the Commission has no jurisdiction over the carriers named in and the subject-matters covered by the orders, we think the fact that Congress saw fit to make the exceptions referred to is persuasive to the effect that Congress believed the Commission would otherwise have jurisdiction over the carriers and subject-matters covered by the exceptions; and a like statement may be made in connection with the other jurisdictional provisions to which the lower court referred.

Section 209 of the transportation act is commonly referred to as the guaranty section. This section, generally speaking, guarantees to all carriers entitled to compensation under the Federal control act, for six months beginning March 1, 1920, the same income, proportionately, they would have had if they had been under Federal control during that period, with modifications and upon conditions which are not important in connection with this discussion; and Title III of the transportation act covers jurisdiction to be exercised by the Railroad Labor Board over wages and working conditions of employes of common carriers.

It is admitted that the carriers to whom the orders are directed are engaged in transporting passengers and property by railroad between points in different States of the United States, and this appears to bring

them and the passengers and property so transported within the jurisdiction of the Commission as that jurisdiction is described in paragraph (1) of section 1 of the interstate commerce act, from which we quote as follows:

> (1) That the provisions of this Act shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, * * * from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, * * *.
>
> (2) The provisions of this Act shall also apply to such transportation of passengers and property * * *, but only in so far as such transportation * * * takes place within the United States, but shall not apply—
>
> (a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

It is contended, however, that said carriers and the railroads operated by them are the same in character as the carrier and railroad involved in *Omaha & Council Bluffs Street Railway Company* v. *Interstate Commerce Commission*, 230 U. S. 324, which this court held were not within the Commission's jurisdiction.

In its decision in the *Omaha case*, this court, in describing the carrier and the business done by it,

and in stating its conclusion, among other things, said:

> The Omaha & Council Bluffs Railway & Bridge Company was chartered as a street railroad company under the laws of Iowa. It owned street car lines in Council Bluffs and, in 1887, was authorized by Congress to construct a bridge across the Missouri River and to operate thereon "steam, cable and street cars." (March 3, 1887, 24 Stat. 501, c. 356.) The Omaha & Council Bluffs Railway, chartered as a street railroad under the laws of Nebraska, owned the street car lines in Omaha and its suburbs, South Omaha, Benson, Dundee and Florence. This street railroad had no right of eminent domain and was not authorized to haul freight, being limited by its charter to carrying passengers only. By lease it acquired the bridge and car lines in Council Bluffs which thereafter it operated as part of its system. * * *. (Id. 332–333.)
>
> The statute in terms applies to carriers engaged in the transportation of passengers or property by railroad.
>
> But, in 1887, that word had no fixed and accurate meaning, for there was then, as now, a conflict in the decisions of the State courts as to whether street railroads were embraced within the provisions of a statute giving rights or imposing burdens on railroads. The appellants cite decisions from twelve States holding that in a statute the word "railroad" does not mean "street railroad." The defense cite decisions to the contrary from an equal number of States. The present record

discloses a similar disagreement in Federal tribunals. For not only did the Commerce Court and the Circuit Court differ, but it appears that the members of the Commission were divided on the subject when this case was decided and also when the question was first raised in *Willson* v. *Rock Creek Ry. Co.*, 7 I. C. C. 83.

This conflict is not so great as at first blush would appear. For all recognize that while there is similarity between railroads and street railroads, there is also a difference. Some courts, emphasizing the similarity, hold that in statutes the word "Railroad" includes street railroad, unless the contrary is required by the context. Others, emphasizing the dissimilarity, hold that "Railroad" does not include street railroad unless required by the context, since, as tersely put by the Court of Appeals of Kentucky, "a street railroad, in a technical and popular sense, is as different from an ordinary railroad as a street is from a road." *Louisville & Portland R. R. Co.* v. *Louisville City Ry. Co.*, 2 Duvall, 175.

But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word "Railroad" will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing this word,

> it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community, even though that community be divided by State lines, or under different municipal control. When these street railroads carry passengers across a State line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. * * *. (Id. 334–336.)

It will be seen that the court was of opinion that the city of Omaha and its suburbs and the city of Council Bluffs constituted in fact only one community, and that the business done by the Omaha & Council Bluffs Street Railway Company in serving that community was simply such as is ordinarily done by a street railroad, properly so-called, which the court distinguished from an interurban railroad in the following language:

> It is said that since 1887, when the act was passed, a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight,

express, and the mail for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight. * * * (Id. 337.)

In its report in No. 228, as hereinbefore shown, the Commission, in describing the carrier and the business done by it, among other things, said:

> This proceeding was instituted by us upon petition filed on behalf of the Pennsylvania-Ohio Power & Light Company, * * * which operates an electric line approximately 14.5 miles in length between the cities of Youngstown, Ohio, and Sharon, Pa., passing through the village of Hubbard, Ohio. * * * (Rec. 14.)
>
> * * * The petitioner estimates that in 1921 it will transport 1,897,890 intrastate and 1,180,607 interstate passengers, * * *. (Rec. 17–18.)

In describing the freight business done by the carrier, the Commission further said:

> The petitioner has connections, one direct and the other over a private siding, at Masury and at Stop 41, both east of Hubbard, with the New York Central Railroad, and while petitioner does not originate and deliver freight traffic to this line, it received from it, during the year 1919 and 1920, 922 cars of freight for delivery chiefly at points on the petitioner's line. The New York Central forms a connecting link between petitioner's line and other trunk lines. The petitioner also operates a

> daily less-than-carload freight service between Youngstown and Sharon, and on three days a week operates a through car between Sharon and New Castle, Pa., via Hubbard and the Sharon & New Castle Railroad. The petitioner also participates with other electric lines in through freight rates from points on its line to Cleveland and Toledo, Ohio, Detroit, Mich., and other points. In 1919 the less-than-carload freight amounted to 6,240 tons and produced a revenue of $18,000, and the carload and switching revenue was $6,246.52. The total, $24,246.52, amounted to about 7 per cent of the gross earnings. In 1920 the less-than-carload tonnage was 5,474 and produced a revenue of $21,221, and the carload and switching traffic yielded $5,259. The total, $26,480, was 7.4 per cent of the gross earnings of the petitioner for that year. (Rec. 18.)

And in its report in No. 229 the Commission, as we have previously shown, described the lines of railroad operated by The Steubenville, East Liverpool & Beaver Valley Traction Company, and the business done by that carrier, as follows:

> The main line of the traction company, which is double tracked, extends along the Ohio River from Vanport, Pa., west to the Pennsylvania-Ohio State line, hereinafter referred to as State Line, thence in a general southerly direction to Steubenville, Ohio, a total distance of 40.2 miles. Of this trackage 11.4 miles are in Pennsylvania and 28.8 miles in Ohio. The line passes through various cities,

townships, villages, and boroughs, including Midland and Glasgow, Pa., East Liverpool, Wellsville, and Toronto, Ohio. (Rec. 7-8.)

Besides a coal branch there are six branch lines engaged in transporting passengers, four in East Liverpool and two in Steubenville. * * * The main line and also the branches are, for the greater distances, upon private rights of way, but where they pass through towns and villages they are generally upon streets and highways.

The company maintains an hourly interurban passenger service upon its main line between Vanport and Steubenville. Passengers, however, are required to change cars at the diamond in East Liverpool. The traction company handles no baggage as such. A daily freight service is maintained between Steubenville and Midland, Pa., and a through car runs from Steubenville to Beaver, Pa., a point on the Beaver Valley Traction line a few miles east of Vanport, as often as the traffic demands, which at time of hearing was about once a week. Except for this traffic to Beaver the traction company handles only freight local to its line. No freight is handled oven [over] the branch lines. The traction company files its tariffs with this Commission, and publishes interstate passenger fares between points on its lines. It is subject to our jurisdiction. *City of East Liverpool, Ohio*, v. *S., E. L. & B. V. T. Co., supra.*

At Vanport the traction company connects with the Beaver Valley Traction Company, which in turn connects with the Pittsburgh &

> Lake Erie Railroad at Beaver. It is stated that as a result of these connections the traction company receives at Vanport full carloads of passengers destined to various points along its line. The Wheeling Traction Company transports large numbers of passengers into Steubenville from Wierton, Follansbee, Wellsburg, and Wheeling, W. Va., and from Bridgeport, Mingo, and other places on the Ohio side of the river, who avail themselves of the facilities of the traction company to reach points between Steubenville and Vanport. (Rec. 8–9.)

We think the foregoing comparisons show clearly that the decision of this court in the *Omaha case* does not support the conclusion of the lower court that the Commission is without jurisdiction over either the Pennsylvania-Ohio Power & Light Company or The Steubenville, East Liverpool & Beaver Valley Traction Company or the transportation of passengers and property in interstate commerce in which those carriers engage. On the contrary, we feel certain the court will conclude that such jurisdiction is fully established by the language contained in paragraph (1) of section 1, to which we have referred.

If the views expressed by the lower court in this connection are found by this court to be correct, the inevitable result will be to leave without governmental regulation of any kind the rates, fares, and charges of interurban common carriers engaged in the transportation of passengers and property between points in different States and Territories of the United States. The court will take judicial

notice of the fact that the interstate business of such carriers is now comparatively large and is increasing in volume rapidly, and under these circumstances we are convinced that the court will not construe the interstate commerce act as including a limitation upon the jurisdiction of the Commission which Congress has not seen fit to put there in plain and unmistakable language.

However, the passenger fares covered by the Commission's order of November 7 are not interstate; they are instead intrastate; and over such fares the Commission does not have general jurisdiction, as is shown by subdivision (a) of paragraph (1) of section 1, hereinbefore set forth. It has jurisdiction over such fares, though, for the purposes and under the conditions described in paragraphs (3) and (4) of section 13 of the interstate commerce act, which read:

> (3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to

this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and

> practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision of any State authority to the contrary notwithstanding.

These paragraphs are an amendment to section 13 which was brought about by the passage of the transportation act, and the language contained in the paragraphs does not indicate an intention on the part of Congress to limit the jurisdiction of the Commission as it is limited, in connection with matters other than those covered by said paragraphs, by the jurisdictional provisions to which the lower court referred.

The jurisdiction exercised by the Commission in making the orders of November 7 appears to us to be practically the same as the jurisdiction exercised by the Commission in making the order involved in *Houston, East and West Texas Railway Company* v. *United States*, 234 U. S. 342, commonly called the *Shreveport case*, which was held by this court to be valid, in a decision rendered on June 8, 1914, a date several years prior to the date of passage of the transportation act.

We have shown that, in the cases under consideration here, the Commission found that unjust discrimination against interstate commerce existed under substantially similar conditions and was caused by the intrastate passenger fares covered by the orders of November 7. Concerning such a case, this court, in its decision in the *Shreveport case*, said:

> Here the Commission expressly found that unjust discrimination existed under substan-

tially similar conditions of transportation and the inquiry is whether the Commission had power to correct it. We are of the opinion that the limitation of the proviso in section one does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was "wholly within one State." These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. * * *. (Id. 358.)

* * * We are not unmindful of the gravity of the question that is presented when state and Federal views conflict. But it was recognized at the beginning that the Nation could not prosper if interstate and foreign trade were governed by many masters, and where the interests of the freedom of interstate commerce are involved the judgment of Congress and of the agencies it lawfully establishes must control. (Id. 359–360.)

THE LOWER COURT ERRED IN ENJOINING ENFORCEMENT OF THE COMMISSION'S ORDERS OF NOVEMBER 7, 1921.

Views expressed by the lower court in the opinions upon which it based its conclusions that the Commission was without jurisdiction over the subject matters covered by the orders of November 7, and over the carriers to whom the orders were directed indicate, we submit, that the court would not have enjoined enforcement of the orders if it had reached a contrary conclusion concerning the question of jurisdiction. Pertinent statements contained in the opinions mentioned are, respectively, as follows:

> The situation is fully and correctly set forth in the Interstate Commerce Commission's report, and, inasmuch as this has been published, 64 I. C. C. 498, it will not be repeated here except so far as is necessary to show clearly the questions to be decided and the basis of our decision. * * *. (Rec. 30.)
>
> The general situation is correctly set forth in the report of the Interstate Commerce Commission, and need not be repeated here. * * *. (Rec. 33.)

In view of these statements and for the reason that the Commission's findings of fact have been fully set forth in this brief under the heading of "Statement," we do not deem it necessary to do more at this point than to call attention to some of the important findings upon which the Commission's conclusions of undue prejudice and preference and unjust discrimination are based.

In No. 228, after finding that the interstate fares of the carrier are reasonable, the Commission found:

That the intrastate fares involved are much lower than said interstate fares. (Rec. 15–16.)

That industries, mercantile establishments, and amusement houses in Sharon compete with those in Youngstown; that residents of Hubbard are employed at each place and travel daily back and forth over the carrier's line; that many of Hubbard's residents likewise travel to one or the other of these points to purchase goods or for other purposes; that in this transportation Sharon and its patrons are discriminated against by reason of the lower intrastate fares between Hubbard and Youngstown, and that workmen living in Hubbard are employed in Sharon. (Rec. 16.)

That because of the existence of the lower intrastate fares the higher interstate fares can not be fully maintained. (Rec. 17.)

That the result of the operations of the carrier for the year 1920 was a deficit of $12,902.12; that the deficit estimated under present fares for the year 1921 was $7,549.85, and that the revenue and surplus estimated under proposed fares for the year 1921 were, respectively, $417,127 and $41,335.06. (Rec. 17.)

That the deficits and surplus above mentioned are the results of computations which do not include allowances to the carrier for returns upon the value of its property. (Rec. 18.)

Other comparisons made by the Commission were as follows:

> It is shown that in 1920 the operations between Hubbard and Youngstown were conducted at a loss of $31,264.06, as compared with a profit of $18,361.94 between Hubbard and Sharon. The petitioner estimates that in 1921 it will transport 1,897,890 intrastate and 1,180,607 interstate passengers, and that at the present fares the intrastate passenger traffic will yield $162,721 as against $204,808 from the interstate passenger traffic. In other words, intrastate traffic, constituting 61.7 per cent of the total traffic, will yield but 44.5 per cent of the total revenue, resulting in a deficit for the entire operation of $7,549.85 as shown above. It estimates that under the proposed fares the Youngstown-Hubbard deficit would be turned into a profit of $16,399.25. (Rec. 17–18.)

In No. 229 the Commission made similar findings concerning the reasonableness of the interstate fares, the disparities between the intrastate and interstate fares, the discriminations which result from such disparities, the impossibility of maintaining the reasonable interstate fares, caused by the existence of the lower intrastate fares, and the results of operations of the carrier, for the years 1918, 1919 and 1920. In illustrating the disparities in cents per passenger mile between the interstate fares on the one hand and the intrastate fares on the other, the Commission

set forth in tabular form comparisons which are as follows:

Interstate (cents).	Intrastate (cents).
2.63	1.31
3.66	1.22
1.92	.48
2.56	1.28
3.84	1.92
3.33	3.33
5	2.5
4.54	4.54
2.21	1.66
2.26	1.77
2.45	1.96
2.3	1.79

(Rec. 10.)

The Commission found that operating results were: For the year 1918 $43,809.02 surplus; for the year 1919 a deficit of $16,761.32, and for the year 1920 a deficit of $52,618.33, while operating incomes for the three years mentioned were, respectively, $770,167.50, $840,600.62 and $949,171.49. (Rec. 12.)

In each case, as hereinbefore shown, the Commission found that, regardless of whether they pertained to passengers traveling in intrastate commerce or to passengers traveling in interstate commerce, the transportation services were performed by the carriers under substantially similar circumstances and conditions.

It will be observed that the matters we have discussed in this brief do not present any conflict between authority exercised by State commissions on the one hand and the Interstate Commerce Commission on the other. In No. 228 the village of Hubbard stands upon its ordinance as a contract right, over which the Ohio commission can exercise

no jurisdiction under the law as construed by the Supreme Court of that State, and the city of Wellsville, Ohio, stands upon a like contract right in No. 229. The two cases are alike in principle, but in No. 229 ordinances of several cities are involved. Also, it will be seen that the scope of the ordinance contracts stretches beyond the boundaries of the municipalities, that is to say, extraterritorial jurisdiction is conferred by the State of Ohio upon each of the municipalities.

If, as held by this court in *New York* v. *United States*, 257 U. S. 591, neither the action of a State legislature, in granting a charter to a corporation and clothing it with power to act as a common carrier, nor provisions contained in the constitution of the State, will be permitted to stand in the way of Federal regulation of interstate commerce, it is difficult to understand how it can be successfully contended that a village ordinance or a city ordinance should be construed as having that effect, since the source of the authority exercised in making such an ordinance is the State of which the village or the city is only a political subdivision.

For the reasons above set forth we insist that the decrees of the lower court should be reversed, and that the cases should be remanded to that court with directions to dismiss the bills of the appellees.

Respectfully submitted.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellant.

DECEMBER, 1923.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923. No. 228.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY, APPELLANTS,

vs.

THE VILLAGE OF HUBBARD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF FOR THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY.

I. STATEMENT OF THE CASE.

1. Introduction.

This is an appeal from the final decree of the United States District Court (sitting, and hereinafter referred to, as the Statutory Court pursuant to the Act of 22 October, 1913, 38 Stat. L. 219) for the Northern District of Ohio, Eastern Division, suspending, restraining and setting aside, an Order of the Interstate Commerce Commission made and entered on 7 November, 1921, in a proceeding entitled: *In the matter of rates, fares and charges of The Pennsylvania-Ohio Power & Light Company within the States of Ohio and Pennsylvania,* Docket No. 12123, 64 I. C. C. 493.

The case comes directly to this Court upon appeal as required by that Act.

The Record is extremely short, as the case was disposed of on the bill, motions and answers. It contains only the bill with exhibits, the answers and motions, the Report and Order of the Commission, the decree and opinion of the Statutory Court.

2. Description of the Parties.

The plaintiff in the bill is the Village of Hubbard, Ohio, a municipal corporation of that State. It is hereinafter referred to as Hubbard.

The defendants are, the United States of America, the Interstate Commerce Commission, and The Pennsylvania-Ohio Power & Light Company.

The Pennsylvania-Ohio Power & Light Company (hereinafter referred to as Carrier) is a corporation of the State of Ohio, being incorporated under Section 8625 of the General Code of Ohio, having the power of eminent domain (R., 25).*

The Carrier owns and operates a *high speed interurban electric railroad* from Youngstown, Ohio, to Sharon, Pennsylvania, a distance of 14.5 miles. Its road is of standard gauge construction and is for the most part built on private right of way. It transports both passengers and freight in interstate commerce (R., 25). It maintains a regular half-hour interurban passenger service between Youngstown and Sharon, and additional special service between Youngstown and Hubbard, and Sharon and Hubbard. Hubbard is 8.75 miles from Youngstown and 7.18 miles from Sharon (R., 14-15). The Carrier transports annually about 1,897,000 *intrastate* and about 1,180,000 *interstate* passengers.

The Carrier has two freight connections on its line with a steam carrier (the New York

* These citations refer to the pages of the Transcript of Record.

Central); one direct, the other over a private siding at Masury, Ohio. While it does not originate freight shipments, it received from the New York Central in 1919 and 1920, 922 cars of freight for delivery to points along its line. The connection with the New York Central gives Carrier access to other trunk line steam carriers (R., 18).

The Carrier also participates with other interurban electric railroads in through freight rates from points along its line to Cleveland and Toledo, Ohio, and Detroit, Michigan, and other points (R., 18).

The Carrier also operates daily a less-than-carload freight service between its terminals, and operates on three days a week a similar service between Sharon and New Castle, Pennsylvania, *via* Hubbard, Ohio, and the Sharon and New Castle Railroad. In 1919 it transported 6,240 tons of this freight, and in 1920, 5,474 tons (R., 18).

The Carrier's line was built about 1901 by the then Youngstown-Sharon Street Railway Company which was later merged with five other Pennsylvania and Ohio corporations under the name of Mahoning & Shenango Railway & Light

Company which later changed its name to The Pennsylvania-Ohio Electric Company and in 1920 sold this line to Carrier which now operates it (R., 14-15).

3. Description of the Subject Matter.

When Carrier's line was constructed about 1901, Hubbard in granting it a franchise to occupy certain streets, enacted in that franchise ordinance of 12 September, 1901 (R., 7-13), and accepted by Carrier's predecessor, a provision which attempted to regulate the passenger fares of Carrier, both interstate and intrastate. The principal fares thus attempted to be prescribed were (R., 10-12, 15):—

Classification of Fare.	*Between.*	*Rate.*
Cash	Hubbard and Youngstown	$ .12
	Hubbard and Sharon	.13
1 round-trip ticket	Hubbard and Youngstown	.20
	Hubbard and Sharon	.20
11 round-trip tickets (special)	Hubbard and Youngstown	2.00
	Hubbard and Sharon	2.00
54-ride commutation ticket	Hubbard and Youngstown	3.80
	Hubbard and Sharon	3.80

These fares continued until 1920, when Carrier's predecessor by tariff filed with the Interstate Commerce Commisison cancelled the round-trip and special round-trip tickets between *Hubbard and Sharon (interstate);* and increased the cash fare between those points from 12 cents to 20 cents and the 54 commutation ticket from $3.80 to $5.00 (R., 15).

Later in the same year Carrier's predecessor filed a tariff with the Interstate Commerce Commission which increased the *Youngstown-Sharon (interstate)* cash fare from 30 cents to 35 cents and the 54 commutation ticket from $9.00 to $10.00.

In the *same* tariff it also increased the *Hubbard-Youngstown (intrastate)* cash fare from 13 cents to 20 cents, and the 54 commutation ticket from $3.80 to $5.00, making the *intrastate* rates the same as the *interstate* rates. This was done in order to remove the discrimination against interstate commerce.

This tariff became effective on *interstate* traffic on 1 October, 1920. A similar tariff was filed with the Public Utilities Commission of Ohio to govern *intrastate* traffic. That tariff never became effective because the Ohio Commission was without statutory power to allow or establish rates in excess of those prescribed by franchise contracts (R., 16).

Under the franchise rates Carrier in 1920 suffered a *deficit* of $12,902 on its passenger traffic, before any reserve for depreciation and renewals (R., 17).

Prior to instituting these proceedings before the Interstate Commerce Commission, Carrier

endeavored to have the unjust discrimination and undue prejudice against *interstate* traffic and undue preference in favor of *intrastate* traffic removed and relief given it by negotiations with Hubbard, but without avail (R., 16).

Carrier then filed its petition with the Commission alleging these facts and asked the Commission to order the unjust discrimination, undue prejudice, undue preference and burden to be removed (R., 14).

After extensive hearings (in which Hubbard and Youngstown participated) the Commission by Report and Order dated 7 November, 1921, found that there was an undue prejudice resulting to persons travelling in *interstate* commerce, an undue preference and advantage resulting to persons travelling in *intrastate* commerce, and an unjust discrimination against *interstate* commerce (R., 19).

It ordered Carrier to cease and desist from practicing the undue prejudice, undue preference and undue advantage, and unjust discrimination, and to establish on or before 4 January, 1922, passenger fares between Hubbard and Youngstown (*intrastate*) which shall not be less than 20 cents cash, and a 54-ride commutation ticket for $5.00 (R., 20).

On 23 December, 1921, before Carrier had made the prescribed rates effective, Hubbard brought this present proceeding to enjoin Carrier and the Commission.

4. Substance of the Bill.

The substance of the bill (R., 1-6) was that the Report and Order of the Commission was invalid because:—

1. It regulated *intrastate* commerce.

2. It deprived Hubbard of its property without due process of law.

3. It impaired the obligation of a contract.

4. This Carrier was not a common carrier by railroad within the meaning of the Interstate Commerce Act. (This charge was made at bar by leave of Court (R., 6).)

5. The Decision of the Statutory Court.

The Statutory Court (Circuit Judge Donehue, District Judges Westenhaver and Killits) denied the several motions to dismiss and sustained the bill solely upon the ground that the Carrier was not a common carrier engaged in the transportation of passengers or property wholly by railroad within the meaning of the Interstate Commerce Act (R., 29-44); and set aside and annulled the order of the Commission and en-

joined the Commission and the Carrier from putting the said Order into effect (R., 44). The decision was written by Judge Westenhaver, and is reported in 278 Federal Reporter, page 754.

II. SPECIFICATIONS OF ERROR.

The assignments of error (R., 52-55) embrace two contentions:—

1. Whether a high speed interurban electric railroad transporting both freight and passengers in interstate commerce is a common carrier wholly by railroad within the meaning of the Interstate Commerce Act.

2. Whether the Village of Hubbard had a real interest in the controversy, and had any standing to maintain the bill.

III. ARGUMENT.

1. The Facts.

The facts set forth on pages 2 to 8, *supra,* are contained either in the bill and answers, or in the Report and Order of the Commission. Indeed the Statutory Court said (R., 30):—

> The situation is *fully* and *correctly* set forth in the Interstate Commerce Commission's report * * *.

That Court however unconsciously fell into error in holding as a *fact* that the less-than-carload freight service which Carrier operates three days a week between Sharon and New Castle, Pennsylvania (R., 32):—

> is loaded and operated *wholly outside* of the State of Ohio and is transported on a line not owned by defendant.

This was assigned as error (R., 55) because the Commission upon the evidence submitted to it had expressely found that Carrier (R., 18):—

> on three days a week operates a through car between Sharon and New Castle, Pa., *via Hubbard* and the Sharon & New Castle Railroad.

This car had to move from Sharon, Pennsylvania, to Hubbard, Ohio, over Carrier's line, and from Hubbard back again into Pennsylvania to New Castle over the Sharon & New Castle Railroad. This is interstate commerce, *Coe* vs. *Errol* (1886) 116 U. S. 517, 29 L. ed. 715.

There was no attack upon the findings of the Commission that the fares attempted to be fixed by franchise contract resulted in an undue prejudice against *interstate* passengers, and undue preference in favor of *intrastate* passengers, and an unjust discrimination against *interstate*

commerce. The *sole* attack upon the Report and Order was that the Commission had no jurisdiction over Carrier and of the proceeding.

2. The Carrier is a Common Carrier Wholly by Railroad Within the Meaning of the Interstate Commerce Act.

The fundamental error of the Statutory Court was its construction of the provisions of Section 1 of the Interstate Commerce Act as amended (41 Stat. L. 474), holding that the word "carrier" as therein used and defined was limited by certain special definitions of that term inserted by the Transportation Act, 1920, which are applicable *only to certain other specific sections.* After quoting at length the several definitions of "carrier" as used in *specific sections* of the Transportation Act, 1920 (R., 36-37), the Court held (R., 41):—

> Electric street, suburban, or interurban railways are *included* within "common carriers by railroad," as that expression is used in section 1 of the Interstate Commerce Act, *only when they are of that character and engaged in that kind of traffic and under the conditions set forth in the parts of the Interstate Commerce Act and the Transportation Act of 1920 as above quoted. They must be operated as a part or parts of a general steam railroad system of transporta-*

> *tion, or they must be engaged in the general business of transporting freight in addition to their passenger and express business,* or they must be operated as a part of a general steam railroad system of transportation or *engaged in the general transportation of freight.* If they are not thus engaged or being thus operated, they are not within the act, nor within the jurisdiction conferred on the Interstate Commerce Commission, even though they may be engaged in interstate passenger business.*

We shall hereafter discuss this theory of interpretation, and at this place merely point out that if the Court were correct that the term "carrier" or "common carrier by railroad" as used in Section 1 of the Act includes *only* interurban electric carriers as described by it, it was folly for the Congress to have gone to the trouble of *restricting* that term in *specific* Sections of the Act when it purposely intended to *exclude* interurban electric carriers from those Sections. The Court eliminated from the *entire* Act common carriers which the Congress eliminated *only from specific Sections and for specific purposes.*

And we may state parenthetically that these proceedings before the Commission could be sus-

* Italics in all quotations from opinions or statutes are ours unless otherwise noted.

tained, with the exception of a technical procedural provision, *independent of the terms of the Transportation Act, 1920.*

(*a*) THE APPLICABLE SECTIONS OF THE ACT PRIOR TO THE AMENDMENTS OF THE TRANSPORTATION ACT, 1920 AND THE JUDICIAL INTERPRETATION OF SECTION 1.

The following Sections are taken from the Act as amended up to 1918, being found in the pamphlet copy of the Act as revised to June 1, 1918, and printed as a Government publication:

(1) *Sections 1, 2, 3 and 15 of the Act.*

Section 1. "That the provision of this Act shall apply * * * to any *common carrier* or carriers engaged in the transportation of passengers *or* property *wholly by railroad*" in interstate commerce.

Section 2 forbade "*any common carrier* subject to the provisions of *this Act*" to practice unjust discrimination.

Section 3 forbade "*any common carrier* subject to the provisions of *this Act*" from granting undue or unreasonable preferences or advantages to any person, corporation or locality.

Section 15 provided for the establishment of through routes and joint rates and classifications whenever *"the carriers"* failed to do so, but contained this limitation:—

> The Commission shall not, however, establish any through route, classification or rate between *street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business* and railroads of a *different character* * * *.

With the Act in this form, the Commission could have decided the issues in this case, (except for a procedural question, see page 35, *infra*), because the proceedings before the Commission were based on the removal of the discrimination and preference condemned by Sections 2 and 3 of the Act under the Shreveport Doctrine. *Houston, East & West Texas Railway Company* vs. *United States* (1914) 234 U. S. 342, 58 L. ed. 1341; *Adams Express Company* vs. *State ex rel Caldwell* (1917) 244 U. S. 617, 61 L. ed. 1352; *Illinois Central Railroad Company* vs. *Public Utilities Commission* (1918) 245 U. S. 493, 62 L. ed. 425. The conclusions of the Commission in this case were supported by those authorities.

(2) *The Decisions of this Court.*

There is nothing in the Act prior to 1920 to indicate that a *high speed interurban electric railroad* (such as Carrier) is excluded from the phrase "a common carrier * * * wholly by railroad" unless such railroad is either

1. Operated as a part of a general *steam* carrier system; or

2. Engaged in the general business of transporting freight in addition to the passenger and express business,

as stated by the Statutory Court.

The cases decided by this Court are conclusive on this point, not to mention the many cases decided by the Commission to which reference will hereafter be made under an appropriate heading (see pages 47 to 51 *infra*).

The first case to come before this Court involving an interurban electric railroad and the Commission, was *United States* vs. *Baltimore & Ohio Southwestern Railroad Company* (1912) 226 U. S. 14, 57 L. ed. 104. The Commission had ordered a switch connection and also through routes between a *steam* railroad and a Traction Company which Mr. Justice Holmes described as (page 18):—

an "interurban" electric railway for passengers and *some* freight.

The question for decision was whether the Traction Company was a "lateral branch line of railroad" which under *Section 1* of the Act was entitled to a switch connection. This Court held it was not. But this Court refused (page 19) to discuss whether it was a "street passenger railway not engaged in the general business of transporting freight" within the meaning of *Section 15* which was not entitled to a through route.

It seems evident this Court did not at that time consider that interurban electric railroads were without the purview of the Act. If this Court had so thought, then the Commission did not have jurisdiction under any theory of the case.

The next case was *Omaha & Council Bluffs Street Railway Company* vs. *Interstate Commerce Commission* (1913) 230 U. S. 324, 57 L. ed. 1501. The company owned and operated as *one system* two purely *urban* street car companies: one in Omaha, Nebraska, and the other directly across the Missouri River in Council Bluffs, Iowa. It was not authorized to carry freight and did not carry freight. In holding that such an *urban* street railway system was not within the mean-

ing of the Act, Mr. Justice Lamar pointed out the following distinctions between a "railroad" within the meaning of the Act and a *street railway:*—

1. Railroads are constructed on their own property while street railways are constructed on streets.

2. Railroads run from town to town and connect with other railroads, and freight may be transported expeditiously; while street railways serve a single community although that community may be divided by a State line, and do not carry freight.

Under the test there laid down, it is clear that Carrier is a "common carrier wholly by railroad" because:—

1. It is built for the most part on its private right of way and is of standard gauge construction.

2. It operates from Youngstown, Ohio, to Sharon, Pennsylvania, a distance of 14.5 miles and connects both with (*a*) *steam* carriers and (*b*) *electric* carriers so that freight is expeditiously transported.

Indeed in the above decision Mr. Justice Lamar made it clear that this Court expressly refrained

from deciding that an electric interurban carrier was not within the terms of the Act; he said (page 337):—

> But it is said that since 1887, when the Act was passed, a *new type of interurban railroad* has been developed which with electricity as a motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed. *We are not dealing with such a case,* but with a company chartered as a street railroad, *doing a street railroad business and hauling no freight.*

There can be no doubt from this language that this Court in 1913 would have held this Appellant Carrier to be a "railroad" within the meaning of the Act.

These two cases are important not only for what they decide, but also for the references made to them by this Court in later cases. The following cases (brushed aside by the Statutory Court) seem to be conclusive that this Court was always of the opinion that high speed interurban electric railroads are within the Interstate Commerce Act.

In *Kansas City Western Railway Company* vs. *McAdow* (1916), 240 U. S. 51, 60 L. ed. 520, this

Court considered a case under the Federal Employers' Liability Act which applied to "every common carrier by railroad while engaged in interstate commerce" (Act of 22 April 1908, Section 1, 35 Stat. L. 65). The defendant was an interurban electric railroad operating from Leavenworth, Kansas, to Kansas City, Missouri, and had a traffic agreement with a street car company in Kansas City over whose tracks it operated. The defendant contended it was not within that act because it was a "street railway company" under the decision of the *Omaha Case*. In sustaining the judgment for the plaintiff, Mr. Justice Holmes said (page 54):—

> The defendant's road appears to be of the class of the traction company that was before the Court in *United States* vs. *Baltimore & Ohio S. W. R. Co.*, 226 U. S. 14, and that was excepted from the decision in *Omaha & C. B. Street R. Co.* vs. *Interstate Commerce Commission*, 230 U. S. 324, 337. Such roads have been held to be within the act of Congress.

In *Spokane & Inland Empire Railroad Company* vs. *United States* (1916), 241 U. S. 344, 60 L. ed. 1037, this Court considered whether an interburban electric railroad was within the meaning of the Safety Appliance Act of 2 March 1893 (27 Stat. L. 531) as amended, particularly by the Act of 2 March 1903 (32 Stat. L. 943), which

required automatic couplers, grab irons, *etc.* on "all trains * * * and similar vehicles used on any *railroad* engaged in interstate commerce" with certain specific exceptions which excluded therefrom "trains, cars and locomotives * * * which are used on *street railways.*" The defendant operated a *street railway* system in Spokane, Washington, and several *interurban* electric railroads, one of which extended to a point in Idaho. The *interurban* railroads were operated separately from the *street railway* although the interurban cars used the latter's tracks and stopped along city streets. Without any discussion this Court treated that electric carrier as a "railroad."

The same electric carrier was again before this Court in *Spokane & Inland Empire Railroad Company* vs. *Campbell* (1916), 241 U. S. 497, 60 L. ed. 1125, which was a proceeding under both the Federal Employers' Liability Act and the Safety Appliance Act. This Court held the electric interburban carrier to be a "railroad" within both acts citing (page 507), among other cases the *Omaha Case.* (See also *International Railway Company* vs. *United States* (1916), 238 Fed. 317 Circuit Court of Appeals, Second Circuit, where Circuit Judge Hough held that the International Railway Company, an electric interurban railroad between Buffalo and Canada,

could be prosecuted as a "railroad" within the meaning of the Safety Appliance Act).

In *Washington Railway & Electric Company* vs. *Scala* (1917), 244 U. S. 630, 61 L. ed. 1360, the action was under the Federal Employers' Liability Act, for damages for the death of plaintiff's decedent. The defendant operated an interurban electric railroad from Washington, D. C. to Cabin John Creek, Maryland, and contended it was a *street railway* and not "a common carrier by *railroad*" within that act. It was held by this Court that the defendant was a common carrier by *railroad*. Mr. Justice Clarke said (pages 637-8):

> With these acts and the evidence and admissions shown in the record before us, it is clear that the defendant was incorporated as, and at the time of the accident complained of was a railway company, not a street railway company; that it had *full powers of eminent domain;* that at the time of the accident complained of it owned and operated a line of electric railway extending from a terminus within the District of Columbia to a terminus at Cabin John Creek, in the state of Maryland, *a large part of the line being constructed on a private right of way,* and that it was at that time a common carrier of passengers for hire between its termini.
>
> It is argued that under the decision in *Omaha & C. B. Street R. Co.* vs. *Interstate*

Commerce Commission, 230 U. S. 324, the railway of the defendant was a *street railroad*, and that, therefore the defendant was not a "common carrier by railroad" within the terms of the Act of 1908 as amended. *That case dealt with a purely street railway in the streets of two cities*, and the decision was that it was not a "railroad" such as was intended to be placed under the jurisdiction of the Interstate Commerce Commission by the Interstate Commerce Act of 1887. The case is of negligible value in determining either the construction of the act we are considering in this case, or the *classification of the defendant, which clearly enough is a suburban railroad common carrier* of passengers within the scope of the Federal Employers' Liability Act, *as is sufficiently decided* by *United States* vs. *Baltimore & O. S. W. R. Co.*, 226 U. S. 14; *Kansas City Western R. Co.* vs. *McAdow*, 240 U. S. 51; *Spokane & I. E. R. Co.* vs. *United States*, 241 U. S. 344; and *Spokane & I. E. R. Co.* vs. *Campbell*, 241 U. S. 497.

It is to be noted particularly in this case that the interurban electric railroad (1) had power of eminent domain, (2) was built largely on its own private right of way, and (3) *apparently carried no freight.* The Carrier in the case at bar (1) has the power of eminent domain, (2) is built largely on its own private right of way, and

(3) *in addition, does carry freight,* both car load and less-than-carload.

It seems clear, in view of this line of cases, that this Court was clearly of the opinion that an interurban electric railroad, such as Appellant Carrier, was within the terms of the Interstate Commerce Act. In the Federal Employers' Liability Cases this Court cited as authorities the *Omaha Case* and the *Baltimore & Ohio Southwestern Railroad Case* as authorities. The administration of the Safety Appliance Act is under the jurisdiction of the Interstate Commerce Commission. It seems rather odd to contend that an electric interurban railroad is a "railroad" within the Safety Appliance Act and under the jurisdiction of the Commission to that extent at least, but is not a "railroad" within the general provisions of the Interstate Commerce Act.

In distinguishing these Liability and Safety Appliance Cases, the Statutory Court said (R., 40):—

> The reason for these holdings is that exceptions within a remedial statute are to be strictly construed, *etc.*

There were no express exceptions in these statutes. The only question was whether *interurban electric railroads* were common carriers by

railroad within the meaning of the statutes. With the aid of the Interstate Commerce Cases, this Court held they were.

We do not believe the Federal Employers' Liability Act and the Safety Appliance Act are more remedial than the Interstate Commerce Act. The Safety Appliance Act is a penalty statute and should be strictly construed. Indeed the Interstate Commerce Act has been held to be remedial legislation. In *New York, New Haven & Hartford Railroad Company* vs. *Interstate Commerce Commission* (1906), 200 U. S. 361, 50 L. ed. 515, Mr. Justice White said (page 391):—

> It can not be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, *was to secure equality as to all, and to destroy favoritism,* these last being accomplished by requiring the publication of tariffs and by prohibiting secret departure from such tariffs, and forbidding rebates, preferences, and all other forms of *undue discrimination.* To this extent and for these purposes the *statute was remedial* and is, therefore, *entitled to receive that interpretation which reasonably accomplishes the public purpose which it was enacted to subserve.*

The construction of the Act by the Statutory Court runs counter to such an interpretation. It

continues and perpetuates an undue prejudice and unjust discrimination against *interstate* passengers, and an undue preference in favor of *intrastate* passengers. The decision perpetuates this condition:—

Interstate passengers pay per mile	*Intrastate passengers pay per mile*
Cash . . . . . 2.79 cents	1.37 cents
Round trip. 2.79 "	1.14 "
Special ticket abolished	1.04 "
Commutation 1.29 cents	0.81 "

and makes the *interstate* passenger traffic (38.3 per cent of the total passenger traffic) bear 55.5 per cent of the total passenger revenue (R., 18). This situation can not be defended. It was condemned by the Commission as an "unjust discrimination against interstate commerce" (R., 19).

State Courts were of the opinion that this Court considered interurban electric railroads as "common carriers wholly by railroad" within the meaning of the Interstate Commerce Act, as well as "railroads" within the Federal Employers' Liability Act and the Safety Appliance Act. This is well shown in the opinion of the Supreme Court of West Virginia in *Shrader* vs. *Stueben-*

ville, East Liverpool & Beaver Valley Traction Company (1919), 99 S. E. 207, P. U. R. 1919 D 895. The plaintiff had an old contract with defendant which entitled him to free passage over the bridge which defendant used in transporting its traffic from Ohio to West Virginia. The defendant abolished the free passage and plaintiff brought this bill to enforce his contract. The Court in sustaining the dismissal of the bill said the record did not show whether defendant was only a street railway or an interurban line. But held that if it was an *interurban line,* then it was within the Interstate Commerce Act and could abolish the free passage. After discussing the decisions of this Court to which we have referred, Mr. Justice Lynch said:—

> Hence, if the fact had appeared that an *interurban electric railway* carrying passengers and freight or express passed over the bridge in question, the latter could be said to be used or operated in connection with a "railroad," and as such would be subject to the provisions of the Act to Regulate Commerce.*

To summarize briefly, it seems evident from the foregoing discussion that prior to 1920, every

* See also: *Heaton* vs. *Washington & Rockville Railway Company,* P. U. R. 1919, C, 106, where the Maryland Public Service Commission held that interurban electric railroad to be under the jurisdiction of the Interstate Commerce Commission.

"common carrier by railroad" was subject to *all the provisions* of the Interstate Commerce Act (not to certain specific sections) and that phrase *included a high speed interurban electric railroad,* such as this Carrier.

The question is: Did the Transportation Act, 1920, so amend the Interstate Commerce Act as to eliminate from the *entire Act* such interurban electric railroads?

(*b*) THE PRINCIPAL SECTIONS OF THE ACT AS AMENDED BY THE TRANSPORTATION ACT, 1920.

In discussing the effect of these amendments, the Statutory Court said (R., 35):—

> The Transportation Act of 1920 leaves the provisions of the Act as to the *carriers* subject to the jurisdiction of the Commission *as they were in these previous acts,* but refers more frequently to street or suburban and interurban electric railways *in order to exclude them from the purview of certain provisions and sections of the Act;*

but held that inasmuch as the Congress did intend to exclude interurban railroads from "certain provisions and sections of the Act," it therefore follows that the Congress intended to exclude them for the *entire Act.* This conclusion is reached although the Court expressly

found that the Congress intended to leave "the provisions of the Act as to *carriers* subject to the jurisdiction of the Commission, *as they were in these previous Acts.*" This is, we believe, an erroneous theory of statutory construction.

Section 1 of the Act, as amended in 1920, provides:—

> (1) That the provisions of *this Act* shall apply to common carriers engaged in:—
>
> (*a*) The transportation of passengers *or* property wholly by *railroad*

in interstate commerce, which was the *same provision* in the earlier Acts. Here it is pertinent to note two points:—

1. The *entire Act* (not a part of it) applies to common carriers as thus defined.

2. A common carrier as thus defined is one which is engaged in "the transportation of passengers *or* property wholly by railroad," and not, as construed by the Statutory Court, engaged in the transportation of passengers *and* property.

The Congress, in 1920, knew that both this Court and the Commission had construed the word "railroad" to include *interurban electric railroads* and re-enacted this portion of Section

1 *without* change. It is a well settled principle of construction that where a statute which has been construed by the Courts has been re-enacted by the Congress in the same or substantially the same terms, the Congress is presumed to have been familiar with such construction and to have adopted it as a part of the statute. *United States* ex rel. vs. *Interstate Commerce Commission* (1918), 246 U. S. 638, 644, 62 L. ed. 914.

The same rule is applied by this Court to *administrative* interpretation of an act by the administrative agency whose duty it is to enforce that act. This rule was announced by this Court in *United States* vs. *Cerecedo Hermanos Y Compania* (1908), 209 U. S. 337, 52 L. ed. 821, Mr. Justice McKenna saying (page 399):—

> And we have decided that the *re-enactment* by Congress, without change, of a statute which had previously received long continued *executive* construction, is an adoption by Congress of such construction. *United States* vs. *Falk,* 204 U. S. 143, 152.

The Statutory Court entirely ignored these rules of construction.

Another cardinal rule of statutory construction is that where the Congress uses broad and sweeping language in an act and subsequently in that

act expressly excludes certain subjects for *specific purposes,* it is clear the Congress intended those subjects to be included within the broad language for *general* purposes. This rule is well stated in *Lewis' Sutherland Statutory Construction* (2nd ed.), Volume II, page 670-672:—

> It has not been an unfrequent mode of legislation to frame an act with general language in the *enacting clause,* and to restrict its operation by a proviso. It is often found difficult to limit the language in the enacting clause so as to admit every exception or limitation designed to be introduced into the section in its finished state. Provisos and *exceptions* are similar; *intended to restrain the enacting clause; to except something which would otherwise be within it, or in some manner to modify it.* * * * The effect of an exception which is a part of the enacting clause and is of general application is simply to restrict it as to the matter excepted. It operates for this purpose co-extensively with the matter which precedes. * * * The *exception* of a particular thing from the operation of the general words of a statute shows that in the opinion of the law-maker the *thing excepted would be within the general words had not the exception been made.* Consequently if the statute is amended by striking out the exception, the intent is clear to put the ex-

> cepted thing within the operation of the general words. An exception is not universally so extensive as the provision which it qualifies, as to subject-matter, for its purpose may be, and usually is, to reduce the subject-matter by withdrawing a part from the operation of the general words, or to give them a qualified operation merely *as to the matter of the exception.* Where there is a prohibition, grant or regulation in *general words* and a *saving of particular things,* there is a strong implication that *what is excepted would have been within the purview if it had not been excepted;* and thus the *purview may be made more comprehensive than it would otherwise have been.**

For the convenience of this Court in the application of the above cardinal principles of statutory construction, we set forth at some length (pages 31 to 39) the principal sections of the Act as amended by the Transportation Act, 1920, showing those sections and parts of sections which (1) apply to *all* carriers and (2) apply only to *specific types* of carriers.

Section 1 grants to the Commission additional powers and duties. In paragraphs (18) to (21),

* Citing among other authorities, the celebrated decisions of *Gibbons* vs. *Ogden* (1824), 9 Wheat. 1, 6 L. Ed. 1, and *Brown* vs. *Maryland* (1827), 12 Wheat. 419, 6 L. ed. 678.

it was provided that no extension or abandonment could be made by a "carrier by railroad" unless with permission of the Commission. But in order to *exclude* from these *specific* paragraphs of Section 1 certain matters and carriers which the Congress thought would otherwise be included, it was expressly provided that:—

> (22) The authority of the Commission conferred *by paragraphs* (18) to (21) both inclusive, shall not *extend* to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban or *interurban electric railways* which are not operated as a part or parts of a general steam railroad system of transporttion.

Here it will be noted that an interurban electric railway transporting *both* passengers *and* property is excluded *unless* it is a part of steam carrier system.*

Section 2 prohibits *"any common carrier subject to the provisions of this Act"* from practicing unjust discrimination. There is no exception as to the class of carrier mentioned in Section 1 (1) of the Act and this indicates clearly that the Con-

* See: *Application of Michigan United Railways Company* (1921), 67 I. C. C. 452, where the Commission held an interurban electric railroad was excluded from paragraphs (18) to (21) of Section 1.

gress intended to include these *high speed inter-urban electric railways* (such as this Carrier) within this prohibition.

Section 3 prohibits *"any common carrier subject to the provisions of this Act"* from making or giving an undue preference or advantage. There is no exception of certain carriers from this prohibition.

Section 4 prohibits *"any common carrier subject to the provisions of this Act"* from violating the long and short haul provisions. Again no exception.

Section 5 (1) prohibits *"any common carrier subject to this Act"* from pooling freight without approval by the Commission.

(2) Allows "any common carrier or carriers engaged in the transportation of passengers *or* property" to acquire control by lease, stock ownership or otherwise of "any other such carrier or carriers" with approval by the Commission.

But in paragraphs (4) to (11) of Section 5 which govern the consolidation of carriers it seems clear that the Congress was dealing only with general *steam* railroad systems for the plan

is to consolidate only "the railway properties of the continental United States."

Section 6 provides that *"every common carrier subject to the provisions of this Act"* shall file and post tariffs and change rates in the manner set forth. Again no exception.

Section 7 makes it unlawful for *"any common carrier subject to the provisions of this Act"* to prevent continuous freight carriage. Again no exception.

Section 8 provides for the civil liability of *"any common carrier subject to the provisions of this Act."* Again no exception.

Section 9 provides for the filing of a complaint with the Commission or with the Courts against *"any common carrier subject to the provisions of this Act."* Again no exception.

Section 10 provides for penalties to be suffered by *"any common carrier subject to the provisions of this Act"* for violations of the Act. Again no exception.

Section 12 confers upon the Commission "authority to inquire into the management and business of *all common carriers subject to the provisions of this Act."* Again no exception.

Section 13 provides in (1) for the filing of complaints with the Commission complaining of anything done or omitted to be done *"by any common carrier subject to the provisions of this Act."* Again no exception.

And in Section 13 (3) and (4), specific authority is given to the "carrier concerned" to petition the Commission to investigate any rate, fare or charge, "made or imposed by the authority of any State," and if the Commission finds that such rate *etc.*, causes any undue preference or advantage to *intrastate* commerce or discriminates against *interstate* commerce, it is the duty of the Commission to prescribe the rates to be charged thereafter so that the preference and discrimination shall be removed "the law of any State or the decision or order of any State authority to the contrary notwithstanding."

These two paragraphs of Section 13 authorized this proceeding before the Commission by Carrier. But neither one was absolutely necessary to support the order made. Carrier could have had a complaint filed against it by an *interstate passenger* and the issues decided, as was done in *Beall* vs. *Wheeling Traction Company* (1921), 60 I. C. C. 600, on re-argument, 63 I. C. C. 220, prior to this amendment to Section 13.

Paragraph (4) of Section 13 is only a legislative declaration of the Shreveport Doctrine which was announced by this Court in 1914, and was not necessary for the disposition of this case.

Carrier is therefore on firm ground when it states that the issues before the Commission could have been adjudicated without reference to any provision of the Act as amended by the Transportation Act, 1920.

Section 15 (1) grants to the Commission power to regulate the rates, *etc.*, charged *"by any common carrier or carriers subject to the provisions of this Act* for the transportation of persons *or* property."

Paragraph (3) contains the same limitation in the earlier act that the Commission can not establish a through route, etc., "between *street electric passenger railways* not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character." As we have previously pointed out (*supra,* page 16), this Court never considered that clause to eliminate *electric interurban railroads* from the *entire* Act.

Section 15a (new) deals with the establishment of rates for *groups* of *steam* railroad systems,

and we find that the Congress specifically defined the word "carrier" when *"used in this Section"* so as to exclude from *this section*:—

(*a*) Sleeping car companies and express companies,

(*b*) Street or suburban electric railways unless operated as a part of a general steam railroad system of transportation,

(*c*) *Interurban electric railways* unless operated as a part of a general steam railroad system of transportation *or* engaged in the general transportation of freight, and

(*d*) Any belt-line railroad, terminal, switching railroad, etc.

It will be noted that the same exception which excludes *from Section 15a,* interurban electric railways transporting *only passengers,* also excludes "sleeping car companies and express companies" which no one would ever contend were not within the *general provisions of the Act.* (See Section 1 (3) of the Act.)

Section 19a provides for the valuation of the property owned or used by *"every common carrier subject to the provisions of this Act."* Here there is no exception.

Section 20 provides that the Commission may require annual reports *etc.,* from *"all common carriers subject to the provisions of this Act, and*

from the owners of all railroads engaged in interstate commerce as defined in this Act." No exception is here inserted, and it is well known that the Commission has for years required a special form of report from electric carriers.

Section 20a (new) governs the issuance of securities and was expressly limited to certain types of carriers, namely *steam* railroad systems. This is so because "carrier" is defined for the purpose of "this Section" as "a common carrier by railroad * * * which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act." This definition alone excludes "pipe line companies; telegraph, telephone and cable companies operating by wire or wireless; express companies" (Section 1 (3)), and certain water carriers (Section 1 (2c), which are all subject to *general provisions* of the Act.

But the Congress was not content with the exclusion of only the above carriers *from this Section 20a.* In addition it expressly excluded by name:—

> a street, suburban or interurban electric railway which is not operated *as a part* of a general *steam* railroad system of transportation which is subject to this Act."

Here it will be noted that even an electric interurban railway *engaged in the genral transportation* of freight (which the Statutory Court considered to be *within* the Act) is excluded unless operated as a part of a general *steam* carrier. Surely the Congress would not have gone to this trouble to exclude *all* independent interurban electric carriers from this *particular* Section 20a if it had not considered that they were under the *general* provisions of this Act.

Section 25 (new) governs foreign shipping and applies only to "any common carrier by water in foreign commerce, whose vessels are registered under the laws of the United States." This excludes all other types of "common carriers."

Section 26 (new) governs the installation of train stop or control and other safety devices and applies to *"any carrier by railroad subject to this Act."* There is no exception here.

We have set forth in detail the principal Sections of the Act as amended in 1920 because we feel that such an analysis conclusively proves:—

1. That the Congress in 1920 realized that this Court and the Commission had construed the phrase "common carrier wholly by railroad" to include these well known interurban electric railroads.

2. That the Congress adopted that construction and intended to include within the *general* provisions of the Act interurban electric railroads whether they transported both passengers *and* freight, or only passengers, or only freight. The Act specifically covers the transportation "of passengers *or* freight," (Section 1 (*a*)), and there is no warrant for the Statutory Court's theory that an electric carrier must transport both passengers *and* freight.

3. That there is no legislative provision in Sections 1, 2, 3 and 13 of the Act (the Sections necessarily involved in the proceedings before the Commission) to exclude therefrom this Carrier which operates a high speed interurban electric railroad and transports both property *and* freight.

The Statutory Court thought it found support for its conclusion in Section 209 of the Transportation Act, 1920 (R., 37). This Section provided a guaranty for a limited time to the carriers which had been *under Federal control.* It excluded from that *specific Section,*

> a street or interurban electric railway *not under Federal Control* at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban

> or interurban passenger traffic or sale of power, heat and light, or both.

This Section however does not exclude all interurban electric carriers. It excludes only an interurban electric railroad which (1) was *not* under Federal control on 28 February, 1920, and (2) had as the principal source of its operating income the designated services.* This Section can not lend any support to the conclusion reached.

The Statutory Court also cited in support of its construction, Title III of the Transportation Act, 1920, which provides for the Labor Board. Section 300 defined a "carrier" for the purpose of *"this title,"* to include,

> any express company, sleeping car company, and *any carrier by railroad, subject to the Interstate Commerce Act,* except a street, *interurban,* or suburban electric railway not operating as a part of a general *steam* railroad system of transportation.

This legislative definition excluded every interurban electric railroad which was operated separately even though it transported both pas-

*The Commission has recognized this express legislative exclusion, *Guaranty Status of Central California Traction Company* (1922), 72 I. C. C. 167. Such an interurban electric carrier is also expressly excluded from Section 204 of the Transportation Act, 1920, by the same legislative definition, *Deficit Status of Galesburg & Western Railroad Company* (1922), 72 I. C. C. 807.

sengers *and* freight, and derived 95 per cent. of its operating revenue from the *freight* traffic.* Yet such a carrier, under the theory of the Statutory Court, is within the general provisions of the Interstate Commerce Act.

If the Congress had not considered that an *interurban* electric railroad was "subject to the Interstate Commerce Act," it seems evident it would not have gone to the trouble of *expressly* excluding it from Title III of the Transportation Act, 1920. The exception is meaningless unless an interurban electric railroad was considered by the Congress to be a "carrier by railroad, subject to the Interstate Commerce Act."

It therefore seems evident that the Statutory Court erred in holding that *all interurban electric railroads* engaged in interstate commerce were excluded from *all* the provisions of the Interstate Commerce Act unless they meet the following conditions set forth by it (R., 41):

> "(1) They must be operated as a part or parts of a general steam railroad system of transportation; or
>
> "(2) They must be engaged in the general business of transporting freight in addition to the passenger and express business."

* See: Decision No. 33—Docket 26-A of the Labor Board, Vol. I, page 53.

Under this theory of interpretation the Statutory Court held that *specific* exceptions in *specific* Sections of the Act exclude from the *general* terms of the *entire* Act all subjects mentioned in the *exceptions*. It cited no authority for this rule of construction. We know of none. We earnestly submit that the Staturtory Court was clearly wrong in its theory of interpreting the Act.

3. This Carrier is Engaged in the General Transportation of Freight in Addition to its Passenger and Express Business.

Even if we concede (which we do not) that the Statutory Court was correct in its interpretation of the Act, yet that Court erred because Carrier is engaged in general transportation of freight.

The Commission found as a fact that (R., 18):

(1) Carrier has two connections with the New York Central over which it received in 1919 and 1920, 922 car loads of freight for delivery along its lines.

(2) These connections with the New York Central give it access to the trunk line carriers.

(3) Carrier participates with other electric railroads in through rates to Detroit, Michigan and other points.

(4) Carrier operates a daily less-than-carload freight service between Sharon and Youngstown (*interstate*) and on three days a week a similar service between Sharon and New Castle *via* Hubbard and the Sharon & New Castle Railroad (*interstate*). It transported in 1919 and 1920, 11,714 tons of such freight.

(5) Carrier's total freight revenue for 1919 and 1920 was about 7 per cent. of its gross revenue being made up of:

	1919	1920	Total
Carload and Switching	$ 6,246	$ 5,259	$11,505
L C L	18,000	21,221	39,221
	$24,246	$26,480	$50,726

The Statutory Court brushes these findings (relative to the less-than-carload freight service) aside with the mere statement that:—

> * * * *this freight service appears to have consisted of packages and parcels and is more nearly like that which is called express than freight traffic.* In any event, the amount, thereof is exceedingly limited, not exceeding 5 per cent. of the gross earnings of the defendant company. Such an incidental and *relatively insignificant and unimportant freight business* cannot be called the general transportation of freight in *addition to its express business.*

This is cited as error (R., 54) because the Court does not point to any portion of the Report of the Commission which justified it in saying that the less-than-carload freight "appears to have consisted of packages and parcels and is more nearly like that which is called express than freight traffic." Its only authority for this statement is (R., 32):—

> *Plaintiff asserts* * * * that its (Carrier's) less-than-carload freight from Youngstown to Sharon consists, in reality, only of parcels or packages more nearly akin to express service than to freight service.

The Commission found as a fact that *all* such shipments (not merely those from Youngstown to Sharon) were less-than-carload freight shipments, and the Court went far beyond its powers in holding as a fact that they were not. In the first part of the opinion the Court said that the "situation is fully and correctly set forth in" the Report of the Commission (R., 30) and yet in the face of that statement and solely upon the assertion of the plaintiff at argument (with all due respect to counsel) finds as a *fact* (R., 42) that the less-than-carload freight shipments were not what the Commission found them to be.

In railroad parlance the term "less-than-carload freight service" has a definite meaning and

is entirely different from *express* service.* It is typically a freight service. This finding of fact was amply supported by the record before the Commission and *this finding was conclusive upon the Court. Manufacturers Railway* vs. *United States* (1918), 246 U. S. 457, 481, 62 L. ed. 831; *Seaboard Air Line Railway Company* vs. *United States* (1920), 254 U. S. 57, 62, 65 L. ed. 129.

The Statutory Court was also of the opinion that merely because this less-than-carload freight service only produced about 5 per cent. of the gross revenue, it was "relatively insignificant freight business." With all due respect to the Court we respectfully ask: What per cent. of the gross revenue must the car load and less-than-carload freight business produce before it is significant? Must it be 10, 15, 25, 30 or 51 per cent. of the gross revenue? We respectfully submit that such a conclusion of the Court was arbitrary.

Merely because Carrier did not in 1919 and 1920, transport more freight than it did, does not in any manner show that it was not *engaged* in the general transportation of freight. The Commission found as a fact that Carrier did trans-

* For example, express service includes a pickup and delivery service at the terminals. See: *In the Matter of Express Rates, Practices, etc.* (1912), 24 I. C. C. 381, 425.

port carload and less-than-carload freight and this finding shows that it was *engaged* in the general transportation of all kinds of freight. The revenue produced by freight shipments is no criterion of the scope of its freight transportation service.

While it is true Carrier does not originate car load freight traffic which it delivers to steam carriers (R., 18) yet this does not support any conclusion that it is not in the general transportation of freight. Most terminal railroads receive more freight from other carriers than they originate and deliver to other carriers. Yet they are common carriers under the jurisdiction of the Commission. See *Manufacturers Railway Company* vs. *United States, supra,* page 46.

We respectfully submit that upon the facts as found by the Commission, the Statutory Court was in error in holding that Carrier was not engaged in the general transportation of freight.

4. The Statutory Court was Bound to Adopt the long Continued Administrative Interpretation of the Act which had Been Adopted by the Congress.

It is a cardinal rule of statutory construction that Courts should accord great weight to the interpretation of an act adopted by the adminis-

trative tribunal whose duty it is to enforce that act. *National Lead Company* vs. *United States* (1920), 252 U. S. 140, 146, 64 L. ed. 496. The rule was recently stated in *McLaren* vs. *Fleischer* (1921), 256 U. S. 477, 65 L. ed. 1052 in sustaining an interpretation of the Homestead Law by the Land Department. After indicating the several possible interpretations of that act, Mr. Justice Van Devanter said (page 480-1):—

> In the practical administration of the act the officers of the land department have adopted and given effect to the latter view. They adopted it *before the present controversy arose or was thought of;* and, except for a departure soon reconsidered and corrected, *they have adhered to and followed it ever since.* Many outstanding titles are based upon it, and much can be said in support of it. If not the only reasonable construction of the act, it is at least an admissible one. It therefore comes within the rule that the practical construction given an act of Congress fairly susceptible of different constructions, by those charged with the duty of executing it, is entitled to great respect, and, *if acted upon for a number of years,* will not be disturbed except for cogent reasons.*

In the Appendix (see page 56, *infra*), we have attached a partial list of cases of the Com-

* Citing many cases in a foot note.

mission in which it has held and treated such interurban electric railroads as within its jurisdiction. This interpretation was placed upon the Act:—

1. As early as 1897 by the Commission in construing the provision "common carriers wholly by railroad."*

2. Has been adhered to and followed ever since.

3. Has been accepted for many years by these interurban electric railroads which have adjusted their service, rates, accounting and rules to meet the Commission's orders.

The Commission has regulated these interurban electric railroads for such a long period and those carriers have adjusted themselves to such regulation that untold confusion and hardship would result if the Commission were not now sustained.

The above principle of construction is applicable not only to interpretations by the Land Department, but also to interpretations by the Treasury Department of the tariff laws, *United States* vs. *Cerecedo Hermanos Y Compania, (supra,* page 29), and of the tax laws, *Lincoln Chemical Company* vs. *Edwards* (1923), 289 Fed.

* *Willson* vs. *Rock Creek Railway Company* (1897), 7 I. C. C. 83.

458 (Circuit Court of Appeals, Second Circuit). There is every sound reason why it should apply to an administrative interpretation of the Interstate Commerce Act by the Commission.

In addition to the above rule of construction, this Court definitely held in *United States* vs. *G. Falk & Brother* (1907), 204 U. S. 143, 152, 51 L. ed. 411; *United States* vs. *Cerecedo Hermanos Y Compania; National Lead Company* vs. *United States, supra,* pages 29 and 48, that where a Federal statute has received a long-continued construction by the administrative agency whose duty it is to enforce the statute, *and the Congress re-enacts the statute without change,* that construction is adopted by the Congress. Applying that principle to this case we find:—

1. Almost from the very beginning the Commission has construed the phrase "common carrier wholly by railroad" in Section 1 of the Act to include *electric interurban railroads.*

2. From the *Omaha Case* to date this Court has adopted the same construction.

3. The Congress in 1920 re-enacted Section 1 without changing this phrase. And in addition to this adoption of the administrative and judicial

construction, the Congress made *specific exceptions* of certain interurban electric railroads from certain *specific sections* (see *supra,* pages 31 to 39), which clearly show that it advisedly adopted that long continued construction.

In view of these principles, we submit, the Statutory Court when it was in doubt, was bound to adopt this long-continued administrative (and judicial) construction placed upon the phrase "common carrier wholly by railroad," especially after the Congress expressly adopted it.

5. The Plaintiff was Without Interest in the Controversy and Could not Maintain the Bill.

In the motion to dismiss the bill this reason was asserted (R., 21). Hubbard's only interest in this controversy was that it had a franchise contract with Carrier which it alleged was binding upon the Commission. It has no property interest which is involved.

In *Worcester* vs. *Worcester Consolidated Street Railway Company* (1905), 196 U. S. 539, 49 L. ed. 591, this Court held that a municipal corporation is only a creature of the State and cannot invoke the contract clause of Article I, Section 10 of the Federal Constitution against the *State* where the latter has abrogated, with consent of the

company, a street paving contract between the municipality and the company. If this be true of a controversy between the municipality and the *State,* it is also true of a controversy between the municipality and the *Nation,* because the Congress is not so restricted by that provision of the Constitution or any other provision. *New York* vs. *United States* (1922), 257 U. S. 591, 601, 66 L. ed. 385.

Mr. Chief Justice Taft in that case clearly pointed out that where the Congress in the effective regulation of interstate commerce authorizes a rate prescribed in a *State constitution or charter* to be increased, the State can not allege a deprivation of property without due process of law. It does not seem conceivable that a *village ordinance* (enacted after the enactment of the Interstate Commerce Act) has greater sanctity than a State constitution or charter.

In *Oklahoma* vs. *Atchison, Topeka & Sante Fe Railway Company* (1911), 220 U. S. 277, 55 L. ed. 465, the State brought an original bill in this Court to prevent the company from charging certain rates which were higher than the rates charged in Kansas on similar commodities, claiming the rates to have been fixed by an act of the Congress. In dismissing the bill, Mr.

Justice Harlan pointed out that no property rights of the State were involved, and that (page 287):—

> It seeks only, as between the railway company and the shippers, by a general comprehensive decree to enforce certain rates and to compel the railway company to respect the rights of *all** of the people who may have occasion to ship such commodities over the railway.†

Inasmuch as this Court has distinctly held that a municipality can not assert any contractual or property right in its franchise as against the Congress, it follows that Hubbard's *entire* interest in this controversy was to compel Carrier to respect the asserted rights of all the inhabitants of Hubbard or Youngstown who may have occasion to travel back and forth over Carrier's line. Such an interest is not sufficient to give it standing to maintain this bill.

The Statutory Court held that Hubbard had a sufficient interest because (R., 33):—

1. It was a party to the proceedings.

2. It was a party to the franchise, the rates of which were increased by the Commission.

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* Italics were inserted by this Court.
† See also: *North Dakota* vs. *Chicago & Northwestern Railway Company* (1922), 257 U. S. 485, 489, 66 L. ed. 329.

Merely because Hubbard appeared before the Commission does not justify its institution of this suit. The City of Youngstown also appeared and yet it could not be claimed that it had standing to maintain the bill. To maintain a bill to annul an Order of the Interstate Commerce Commission, the plaintiff must have a *real interest* which has been jeopordized. *Edward Hines Yellow Pine Trustees* vs. *United States* (1923), U. S. , 68 L. ed. 56. Hubbard had none.

The Court cited *New York City* vs. *United States* (1921), 272 Fed. 768 to sustain its second reason. While it is true the Court in that case did justify the City's position on the ground that it had a franchise contract with one of the defendants the rates of which were increased, yet it also found that the City had an interest in the controversy "as a shipper and receiver of milk and cream for its institutions." This fact seems to be the sound basis for the decision, and this fact is lacking in the case at bar.

We therefore submit that the Statutory Court erred in not sustaining the motion to dismiss the bill because Hubbard had no real interest in the controversy, and had no standing to maintain the bill.

IV. CONCLUSION.

We cannot close this brief without pointing out to this Court the equities of this case, and the results which will flow from an affirmance of this decree.

The so-called franchise rates attempted to be prescribed 23 years ago are seriously interfering with interstate commerce. In 1920 Carrier had a *deficit* of $12,902, before depreciation and renewal reserves, in the transportation of passengers, although the *interstate* traffic had a *profit* of $18,362 (R., 17).

Unless this decree is reversed, the various States will be permitted eventually to strangle interstate commerce transported over these interurban electric railroads. Each State will compete in the race for preferences and advantages in both passenger and freight traffic on these electric carriers. The result can only be chaos and then oblivion for these electric carriers which are increasingly taking a larger and larger part in National transportation.

The Carrier earnestly submits that this Court should reverse the final order and decree of the Statutory Court with directions to dismiss the bill at the cost of the plaintiff.

Respectfully submitted,

DOUGLASS D. STOREY,
U. C. DEFORD,
Solicitors.

APPENDIX.

CHRONOLOGICAL LIST OF CASES DECIDED BY INTERSTATE COMMERCE COMMISSION HOLDING OR TREATING INTERURBAN ELECTRIC RAILROADS WITHIN ITS JURISDICTION.

Willson vs. *Rock Creek Rwy. Co.* (1897), 7 I. C. C. 83;

Chicago & Milwaukee R. R. vs. *Illinois Central R. R.* (1907), 13 I. C. C. 20;

Cedar Rapids & Iowa City Rwy & Light Co. vs. *Chicago & Northwestern Rwy. Co.* (1908), 13 I. C. C. 250;

Beal vs. *Washington, Alexandria & Mt. Vernon Rwy. Co.* (1911), 20 I. C. C. 406;

C. & C. Traction Company vs. *B. & O. S. W. R. R.* et al. (1911), 20 I. C. C. 486;

Citizens of Somerset, etc. vs. *Washington Rwy. & Elec. Co.* (1911), 22 I. C. C. 187;

Silvester, et al. vs. *City & Suburban Rwy. Co.* (1912), 22 I. C. C. 201;

Bilzer vs. *Washington-Virginia Rwy. Co.* (1912), 24 I. C. C. 255;

Ford vs. *Washington-Virginia Rwy. Co.* (1912), 24 I. C. C. 632;

St. Louis, Springfield & Peoria R. R. vs. *Peoria & Pekin Union Rwy. Co.* (1913), 26 I. C. C. 226;

Louisville Board of Trade vs. *Indianapolis, etc. Traction Co.,* et al. (1913), 27 I. C. C. 499;

Jurisdiction over Urban Electric Lines (1915), 33 I. C. C. 536;

Chicago, Ottawa & Peoria Rwy. Co. vs. *C. & N. W. Rwy. Co.* (1915), 33 I. C. C. 573;

Stuebenville vs. *Tri-State Rwy. & Elec. Co.* (1916), 38 I. C. C. 281;

Knapp Supply Company vs. *Ohio Electric Rwy. Company* (1916), 38 I. C. C. 627;

St. Louis, Mo.-Illinois Passenger Fares (1916), 41 I. C. C. 584;

Lourie Mfg. Co. vs. *Cincinnati Northern R. R. Co.,* et al. (1916), 42 I. C. C. 448; aff. (1918) 49 I. C. C. 64;

Gasoline from Coffeyville, Kansas (1917), 43 I. C. C. 98;

Michigan Railway Co. vs. *Michigan Central R. R.* (1918), 49 I. C. C. 255;

Aurora, Elgin & Chicago R. R. Co. vs. *Indiana Harbor Belt R. R. Co.* (1918), 51 I. C. C. 331;

East Liverpool vs. *Stuebenville, East Liverpool & Beaver Valley Traction Company* (1918), 51 I. C. C. 563;

Hurst vs. *Boise Valley Traction Company* (1918), 51 I. C. C. 697;

Louisville Passenger Fares (1919), 52 I. C. C. 366;

St. Louis Electric Terminal Rwy. Co. vs. *C. C. & C. St. L. Rwy. Co.*, et al. (1919), 55 I. C. C. 52; (1920) 58 I. C. C. 597;

Newspapers on Passenger Cars (1920), 57 I. C. C. 743;

Badger Lumber Co. vs. *Kansas City Rwy. Co.*, et al. (1920), 58 I. C. C. 97;

Chicago, Lake Shore & S. Bend Rwy. Co. vs. *Director General*, et al. (1920), 58 I. C. C. 135;

Ex parte 74 (1920), 58 I. C. C. 220, 253;

Local Fares of Hudson & Manhattan R. R. Co. (1920), 58 I. C. C. 270;

Electric Railway Mail Pay (1920), 58 I. C. C. 455;

Chicago, Lake Shore & S. Bend Rwy. Co. vs. *Director General*, et al. (1920), 58 I. C. C. 647;

Cancellation of Joint Class Rates from Toledo & Western R. R. Co. (1920), 59 I. C. C. 122;

Joint Passenger Fares (Interstate Consol. St. Rwy. Co. and Rhode Island Company) (1920), 59 I. C. C. 170;

United Iron Works, Inc. vs. *Director General*, et al. (1920), 59 I. C. C. 312;

Class & Commodity Rates of Kansas City Railways Company (1920), 59 I. C. C. 382;

Cancellation of Joint Through Freight Rates in connection with Missouri & Kansas Rwy. Co. (1920), 59 I. C. C. 404;

Local & Joint Passenger Rates (Wheeling Railway Company) (1920), 59 I. C. C. 430;

Switching & Absorption at Paris, S. C. (Piedmont & Northern Rwy. Co.) (1921), 60 I. C. C. 210;

Badger Lumber Co. vs. *Sante Fe Rwy.*, et al. (1921), 60 I. C. C. 278;

South Carolina Fare & Charges (1921), 60 I. C. C. 290, 294;

Beall vs. *Wheeling Traction Company* (1921), 60 I. C. C. 600; aff. 63 I. C. C. 220;

Electric Coal Co. vs. *Director General*, et al. (1921), 60 I. C. C. 683;

Greater Belleville Board of Trade vs. *East St. Louis & Suburban Rwy. Co.* (1921), 60 I. C. C. 741;

W. B. A. Commuters Club vs. *Washington, Balt. & Annapolis Electric R. R. Co.* (1921), 61 I. C. C. 302;

Intrastate Fares of Chicago, North Shore & Milwaukee R. R. Co. in Illinois (1921), 62 I. C. C. 188;

Fares of Washington-Virginia Rwy. Co. (1921), 62 I. C. C. 200;

Gillespie Coal Co. vs. *Illinois Traction System* (1921), 62 I. C. C. 335;

Matter of Intrastate Fares of Chicago, North Shore & Milwaukee Railroad in Illinois (1921), 62 I. C. C. 188;

Fares of Washington-Virginia Railway Company (1921), 62 I. C. C. 200;

Kansas Rates, Fares, Charges (Joplin & Pittsburgh Railway Company) (1921), 62 I. C. C. 440;

Cement to Washington, Baltimore & Annapolis Electric Railroad Stations (1921), 63 I. C. C. 264;

New Albany vs. *Louisville & Northern Railway & Lighting Company* (1921), 64 I. C. C. 468;

Ohio Rates, Fares & Charges (The Pennsylvania-Ohio Power & Light Company) (1921), 64 I. C. C. 493;

Ohio Rates, Fares & Charges (Steubenville, E. L. & B. V. Traction Co.) (1921), 64 I. C. C. 517;

Intrastate Rates within Illinois (1922), 66 I. C. C. 350;

Cancellation of Class Rates from Indiana to Ohio via Terre Haute, Ind. & Eastern Traction Company (1922), 66 I. C. C. 449;

Indiana Passenger Fares & Charges (1922), 69 I. C. C. 180;

Providence Fruit & Produce Company vs. *Rhode Island Company* et al, (1922), 69 I. C. C. 422;

Buckeye Pipe Line Co. vs. *B. & O. R. R.*, et al. (1922), 73 I. C. C. 19;

Hood Coal Company vs. *Monongahela Power & Railway Co.* (1922), 73 I. C. C. 54;

Michigan Railroad Company vs. *Pere Marquette*, et al. (1922), 74 I. C. C. 496;

Farmers Square Deal Grain Company, et al. vs. *Fox & Illinois Union Rwy. Co.*, et al. (1922), 74 I. C. C. 593;

Intrastate Rates within Illinois (Chicago, Lake Shore & South Bend Rwy. Co.) (1923), 77 I. C. C. 173.

In the Supreme Court of the United States.

OCTOBER TERM, 1923. No. 228.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY, APPELLANTS,

vs.

THE VILLAGE OF HUBBARD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

SUPPLEMENTAL BRIEF FOR THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY UPON RE-ARGUMENT.

I. FOREWORD.

This case and the *Wellsville Case* (No. 229, October Term, 1923) were argued together before this Court on 22 April, 1924. On 9 June, 1924, this Court, on its own motion, restored both cases on the docket for re-argument.

II. SUPPLEMENTAL ARGUMENT.

The facts in this case are not in dispute. This Appellant Carrier is distinctly not a street railway; it is an *interurban electric railroad* (see original brief pages 3-4). The question before this Court is the jurisdiction of the Interstate Commerce Commission over electric railroads.

1. The Fundamental Error of the Statutory Court.

As we pointed out in our original brief (pages 11-43) the fundamental error of the Statutory Court was its construction of Section 1 of the Interstate Commerce Act. That Section always provided that the *entire* Act applied to every common carrier "engaged in the transportation of passengers **OR** freight wholly by railroad" in interstate commerce.

The Statutory Court, however, construed that language to require the transportation to be *both*

"of passengers **AND** freight." There is nothing in the entire code of Federal regulatory legislation which justifies such a construction. The adoption of such a construction would be disastrous. One of numerous illustrations is sufficient.

The Hudson River Tube System (Hudson & Manhattan Railroad Company) transports by electric railroad many millions of *passengers* between New York and northern New Jersey points. *It does not transport one ounce of freight, express or mail.* Under the theory of the Statutory Court that carrier would not be subject to the jurisdiction of the Commission, although it has been for many years. *Local Fares of the Hudson & Manhattan Railroad Company* (1920), 58 I. C. C. 270. If that carrier is not under the jurisdiction of the Interstate Commerce Commission, it is not under the jurisdiction of any regulatory commission for any practical purpose because practically all its transportation service is strictly interstate commerce. Is a construction which would produce such a result the construction this Court should adopt?

In the case at bar the affirmance of the Statutory Court's decree would exempt from all regulation all the *interstate* service of Appellant Carrier. Is a construction sound which would leave

unregulated all the *interstate* service of this Carrier?

We earnestly contend that the transportation of freight by Carrier was not a *sine qua non* to the jurisdiction of the Commission. Even if Carrier did not transport one ounce of freight (it did transport 922 carloads and 12,714 tons of less-than-carload freight in 1919 and 1920), nevertheless it was a common carrier by railroad subject to the Act. We fail to perceive why the transportation of *property* should be so dignified above the transportation of *passengers*. The Act makes no such distinction, but places both on the same level. As was said by Judge Wolverton in *Pacific Spruce Corporation* vs. *McCoy, et al.* (Dist. Ct. Oregon, 1923), 294 Fed. 711, 714:—

> It is not essential for constituting the utility a common carrier that it carry *both* passengers *and* freight, or that it carry all kinds of freight.*

This Court in the *Tap Line Cases* (1914), 234 U. S. 1, 58 L. ed. 1185, held carriers to be common carriers by railroad subject to the Act and under the jurisdiction of the Commission when they did not carry a *single passenger.*

* Italics in all quotations are inserted by us unless otherwise designated.

The only basis upon which the construction of the Statutory Court can rest is: *Steam* carriers are subject to the Act if they transport *either* passengers *or* property. *Electric* carriers are subject to the Act if they transport *both* passengers *and* property.†

The weakness of this basis is that the Congress has made no such distinction in the *motive power* by which to test the application of the Act to an interstate carrier. As was said by Mr. Commissioner Harlan in *Chicago & Milwaukee Electric Railroad Company* vs. *Illinois Central Railroad Company et al.* (1907), 13 I. C. C. 20, 26:—

> It is scarcely necessary to add that the apprehension of counsel that the merits of complainant's contention may be prejudiced or obscured by the fact that it is an electric line is without foundation. *The act makes no distinction between railroads that are operated by electricity and those that use steam; nor has the Commission thought at any time to make such distinction. Both are subject to the act when engaged in interstate transportation and are entitled to equal consideration in any controversy before us.* Moreover, progress in the science of electricity and the rapid increase of new devices for its application have led many practical railroad men to think that we may be measurably near its general

† And too, the property transported must be of all classes and kinds, and produce a revenue in excess of 5% of the gross revenue (R. 42).

use as the chief motive power in transportation.‡

That such a basis would be clearly unsound was recognized by this Court in *Omaha & Council Bluffs Street Railway Company* vs. *Interstate Commerce Commission* (1913), 230 U. S. 324, 337, 57 L. ed. 1501.

There is no distinction between steam and electric railroads either in law or in fact. In *Booth: Street Railways* (2nd Ed., 1911), page 696, it is said of these electric railroads:—

> In the country, however, the modern lines are constructed to a large extent upon private rights of way, upon road beds similar in construction to steam railroads, with the "T" rail, and, in some cases, upon graded and rock ballasted roads; the cars run at a high rate of speed, stop only at designated stations, and usually are larger and heavier than ordinary street cars. *In fact, they are becoming more and more like commercial railroads.* Many of them carry mail, express and light freight; some of them carry heavy freight, a few of them operate special freight trains, while on some of the western lines sleeping cars have been added to the limited trains.

‡ That in the near future most carriers by railroad will be operated by electric motive power cannot be doubted. See the comprehensive report on this matter submitted to the Secretary of Interior in 1921, *A Super Power System for the Region Between Boston and Washington* (United States Geological Survey, Professional Paper 123), pages 50-83.

With the exception of the statement concerning sleeping cars, the above quotation accurately describes the road and operation of Carrier in the case at bar. (See original brief, pages 3-4.)

We earnestly submit that the Statutory Court committed a fundamental error in construing Section 1 of the Act so as to require the transportation of *both* passengers **AND** property by an electric carrier as the test of being subject to the Act.

2. The Subsidiary Errors of the Statutory Court.

The Statutory Court, having committed this fundamental error, endeavored to bolster up its position by various methods and in so doing committed other errors.

First.—The Statutory Court sought to avoid the effect of the decisions of this Court in the Liability and Safety Appliance Cases (see original brief, pages 18-24), in which similar electric railroads were held to be "common carriers by railroad." This Court, however, has made no such distinction. In construing the phrase "common carrier by railroad" of the Interstate Commerce Act itself in the recent case of *United States ex rel.* vs. *Interstate Commerce Commission,* No. 288, October Term, 1923, decided 26 May, 1924, 68 L.

ed. , this Court cited with approval a prior decision under the Employers' Liability Act (*Wells Fargo & Company* vs. *Taylor,* 254 U. S. 175, 65 L. ed. 205), which had defined a "common carrier by railroad" as,

> One who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier.

This definition did not rest upon the words of any particular act, but was "in accord with the ordinary acceptance of the words." We can not conceive how this Carrier fails to meet that definition.

There is nothing either in the Liability and Safety Appliance Acts or the decisions of this Court construing them to justify the distinction made by the Statutory Court, that an electric railroad is a "common carrier by railroad" within the meaning of that phrase in those two acts, but not within the meaning of that phrase in the Interstate Commerce Act.

Second.—The Statutory Court sought to belittle Carrier's freight transportation service, saying (R. 32):—

> *Plaintiff asserts* that demurrage on cars received from the New York Central Railroad begins to run from the time the cars are delivered to the defendant's line.

Passing the question that the Commission did not so find and that this case was submitted on the Report and Order of the Commission (R. 43-44), nevertheless it is of no importance in the determination of this case. In *Upper Merion & Plymouth Railroad Company* vs. *Pennsylvania Railroad Company* (1923), 81 I. C. C. 191, the Commission held the complainant to be a common carrier by railroad although it issued no bills of lading for through traffic and *demurrage was handled directly between the shippers and the trunk line carriers.* Such minor incidents in the transportation service are not material, *Hood Coal Company* vs. *Monongahela Valley Traction Company* (1922), 73 I. C. C. 54, where an electric interurban railroad was held to be subject to the Act.

The Statutory Court brushed aside the express findings of the Commission (R. 18) that in 1919-20 Carrier transported over its lines 922 carloads of freight and 12,714 tons of less-than-carload freight and that it has through freight rates with other electric railroads, by stating (R. 42):—

> In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent. of the gross earnings of the defendant company. Such an incidental and relatively insignificant and unimportant freight business can not be called the general transportation of freight in addition to its express business.

As we have consistently maintained, it was not necessary for Carrier to have transported one ounce of freight to be under the jurisdiction of the Commission (*supra*, pages 2-7). However, Carrier not only held itself out to transport, but actually did transport, freight for the public generally and the Commission expressly so found. In the *Tap Line Cases, supra*, this Court found that one of the carriers transported *no passengers*, and that the passenger receipts of another of the carriers were only $473.77 out of a total operating revenue of $220,985.94 or about 1/5 of 1 per cent. This Court was not concerned with such minor facts, because, as it pointed out (page 24):—

> the *extent* to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the *right of the public* to use the road's facilities and to demand service of it, rather than the *extent* of its business, which is the real criterion determinative of its character.

In the case at bar, the Commission has found that the public may use and has generally used Carrier's freight transportation service, both directly and by joint service with trunk line steam carriers, which are unquestionably subject to the Act. This finding covers the important and outstanding fact. It is immaterial that, during the

two years involved, the public made no greater use of this service. The Commission found all the facts which show that Carrier is engaged generally in both the passenger and freight transportation service. The findings are conclusive.

Third.—The Statutory Court combed the Interstate Commerce Act and the Transportation Act, 1920, for all instances where the Congress, for one reason or another, expressly excluded interurban electric railroads from the operation of *specific* sections and parts of sections of the acts (R. 36-38). It added up all these express exclusions, and concluded that since the Congress saw fit to exclude interurban electric railroads by *express* language from *certain* portions of the Act, *ergo,* it intended to exclude them by *implication* from the *entire* Act. It entirely overlooked the fact that the Congress made no such exclusions in Sections 1, 2 and 3 of the Act (the only Sections involved in these proceedings). The fact that the Congress deemed it necessary to exclude interurban electric railroads by express language from certain portions of the Act, is conclusive that the Congress considered interurban electric railroads to be "common carriers by railroad" subject to the *other portions of the Act* and under the jurisdiction of the Commission. If interurban electric railroads were not "common carriers by railroad"

within the meaning of Section 1 of the Act, they could not possibly be "common carriers" within the meaning of those Sections and parts of Sections from which the Congress expressly excluded them. The only rational conclusion which can be drawn from the action of the Congress in the Transportation Act, 1920, is that it adopted the long and uniform administrative interpretation of the Commission and intended these interurban electric railroads to be "common carriers by railroad" subject to the Act and under the jurisdiction of the Commission.

The Statutory Court gave no weight to the long and uniform construction placed upon the Act by the Commission and the adoption of that uniform construction by the Congress in 1920. (See original brief, pages 47-51.) As an appendix to our original brief we filed a partial list of cases decided by the Commission holding or treating electric railroads within its jurisdiction. As an appendix to this brief we file an analysis of those cases according to subject matter, from which the Court will readily perceive the broad interests affected and the chaotic condition which would arise by a reversal of the position long adhered by the Commission and acquiesced in by the Congress.

III. CONCLUSION.

If the Congress had not intended these interstate electric railroads to be subject to the Act and under the jurisdiction of the Commission, then this Court should so hold, nothwithstanding the disturbance of this important branch of interstate commerce transportation service which will arise from such a ruling. But this Court can reach such a conclusion only by disregarding the fact that the two other coordinate branches of the Government have consistently interpreted the Act to include these electric carriers. The Commission has consistently so interpreted the Act from 1897. The Congress, knowing of this long and uniform administrative interpretation, adopted it in the Transportation Act, 1920, by reenacting without change the original definition of "carriers" in Section 1; and by expressly excluding such electric carriers from specific Sections and parts of Sections *which would otherwise have applied to them.*

We earnestly submit, therefore, that this Court should reverse the Statutory Court with directions to dismiss the bill, and construe the Act so as to produce no incongruous results.

Respectfully submitted,

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APPENDIX.

ANALYSIS ACCORDING TO SUBJECT MATTER OF THE PARTIAL LIST OF CASES DECIDED BY THE INTERSTATE COMMERCE COMMISSION HOLDING OR TREATING INTERURBAN ELECTRIC RAILROADS WITHIN ITS JURISDICTION (SEE ORIGINAL BRIEF, PAGES 56-61).

I. Regulation of Just and Reasonable Rates.

1. COMPLAINT SUSTAINED—RATES REDUCED.

Beal vs. *Washington, Alexandria & Mt. Vernon Rwy.* (1911) 20 I. C. C. 406;

Citizens of Somerset vs. *Washington Railway & Elec. Co.* (1912) 22 I. C. C. 187;

Bitzer vs. *Washington-Virginia Rwy. Co.* (1912) 24 I. C. C. 255;

Steubenville vs. *Tristate Rwy. & Elec. Co.* (1916) 38 I. C. C. 281;

Louri Mfg. Co. vs. *Cincinnati Northern R. R. et al.* (1916) 42 I. C. C. 448;

Gasoline from Coffeyville, Kansas (1917) 43 I. C. C. 98;

Newspapers on Passenger Cars (1920) 57 I. C. C. 743;

Local & Joint Passenger Rates (1920) 59 I. C. C. 430;

New Albany vs. *Louisville & Northern Rwy. & L. Co.* (1921) 64 I. C. C. 468;

Buckeye Pipe Line Co. vs. *B. & O. R. R. et al.* (1922) 73 I. C. C. 19.

2. Complaint Dismissed—Rates Sustained.

Silvester vs. *City & Suburban Rwy. Co.* (1912) 22 I. C. C. 201;

St. Louis, Mo.—Illinois Passenger Fares (1916) 41 I. C. C. 584;

East Liverpool vs. *Steubenville, etc. & Beaver Valley T. Co.* (1918) 51 I. C. C. 563;

Badger Lumber Co. vs. *Kansas City Rwy. Co. et al.* (1920) 58 I. C. C. 97 (freight). See also 60 I. C. C. 278;

Local Fares of Hudson & Manhattan R. R. (1920) 58 I. C. C. 270;

Joint Passenger Fares (1920) 59 I. C. C. 170;

Class & Commodity Rates on Kansas City Rwy. Co. (1920) 59 I. C. C. 382;

Greater Belleville B. T. vs. *East St. Louis & Surburban Rwy. Co.* (1921) 60 I. C. C. 741;

Commuters Club vs. *W. B. & Annapolis Electric R. R.* (1921) 61 I. C. C. 302;

Fares of Washington-Va. Rwy. Co. (1921) 62 I. C. C. 200;

Providence Fruit & Produce Co. vs. *Rhode Island Co.* (1922) 69 I. C. C. 422;

Hood Coal Co. vs. *Monongahela Valley T. Co.* (1922) 73 I. C. C. 54.

II. Unjust Discrimination and Undue Prejudice.

1. COMPLAINT SUSTAINED.

Ford vs. *Washington-Va. Rwy. Co.* (1912) 24 I. C. C. 632;

Hurst vs. *Boise Valley Traction Co.* (1918) 51 I. C. C. 697;

Beall vs. *Wheeling Traction Company* (1921) 60 I. C. C. 600.

2. COMPLAINT DISMISSED.

Willson vs. *Rock Creek Rwy. Co.* (1897) 7 I. C. C. 83.

III. Reparation.

1. GRANTED.

United Iron Works vs. *Director General, et al.* (1920) 59 I. C. C. 312;

Buckeye Pipe Line Co. vs. *B. & O. R. R., et al.* (1922) 73 I. C. C. 19.

2. DENIED.

Badger Lumber Co. vs. *Kansas City Rwy. Co.* (1920) 58 I. C. C. 97;

Electric Coal Co. vs. *Director General, et al.* (1921) 60 I. C. C. 683;

Gillespie Coal Co. vs. *Illinois Traction System* (1921) 62 I. C. C. 335.

IV. 15th Section Application—Increased Rates.

Louisville Passenger Fares (1919) 52 I. C. C. 366 (passenger);

Badger Lumber Co. vs. *Kansas City Rwy. Co.* (1920) 58 I. C. C. 97 (freight).

V. 15 A Section Application—Increased Rates.

Ex parte 74 (1920) 58 I. C. C. 220, 253.

VI. 13 (3) Section Application—Removal of Discrimination and Prejudice to Interstate Commerce.

APPLICATIONS GRANTED.

South Carolina Fares & Charges (1921) 60 I. C. C. 290, 294;

Intrastate Fares of Chicago, North Shore & Milwaukee R. R. (1921) 62 I. C. C. 188;

Kansas Rates, Fares & Charges (1921) 62 I. C. C. 440;

Ohio Rates, Fares & Charges (The P-O P. & L. Co.) (1921) 64 I. C. C. 493;

Ohio Rates, Fares & Charges (S. E. L. & B. V. T. Co.) (1921) 64 I. C. C. 517;

Intrastate Rates within Illinois (1922) 66 I. C. C. 350;

Indiana Passenger Fares & Charges (1922) 69 I. C. C. 180;

Intrastate Rates in Illinois (1923) 77 I. C. C. 173.

VII. Filing Reports of Finances, Operations and Accidents.

Jurisdiction over Urban Electric Lines (1915) 33 I. C. C. 536.

VIII. Regulation of Tariff Rules.

Knapp Supply Company vs. *Ohio Electric Rwy. Co.* (1916) 38 I. C. C. 627. (Tariff rule governing shipment of pipe found unreasonable.)

IX. Through Routes and Joint Rates.

1. ESTABLISHMENT OF.

A. *Granted.*

Cedar Rapids & Iowa City Rwy. & L. Co. vs. *Chicago & Northwestern R. R.* (1908) 13 I. C. C. 250;

Cincinnati & Columbus T. Co. vs. *B. & O. S. W. R. R.* (1911) 20 I. C. C. 486 (reversed by Supreme Court);

St. Louis etc. Co. et al. vs. *Peoria & Pekin Union Rwy. Co.* (1913) 26 I. C. C. 226;

Louisville Board of Trade vs. *Indianapolis etc. Traction Co.* (1913) 27 I. C. C. 499;

St. Louis Electric Terminal Co. vs. *C. C. & St. Rwy. Co.* (1919) 55 I. C. C. 52;

Chicago, L. S. & S. B. Rwy. Co. vs. *Director General et al.* (1920) 58 I. C. C. 647;

Michigan Railroad Co. vs. *Pere Marquette et al.* (1922) 74 I. C. C. 496.

B. *Refused on Grounds of no Necessity.*

Chicago & Milwaukee R. R. vs. *Illinois Central* (1907) 13 I. C. C. 20;

Chicago etc. Rwy Co. vs. *Chicago & N. W. R. R.* (1915) 33 I. C. C. 573;

Michigan Rwy. Co. vs. *Michigan Central R. R.* (1918) 49 I. C. C. 255;

Chicago, L. S. & S. B. Rwy. Co. vs. *Director General* (1920) 58 I. C. C. 135;

Farmers Square Deal Grain Co. vs. *Fox & Illinois Union Rwy. Co. et al.* (1922) 74 I. C. C. 593.

2. Cancellation of Refused.

Cancellation of Joint Class Rates (1920) 59 I. C. C. 122;

Cancellation of Joint Through Rates (1920) 59 I. C. C. 404;

Cement to W. B. & A. Electric R. R. Stations (1921) 63 I. C. C. 264;

Cancellation of Joint Class Rates (1922) 66 I. C. C. 449.